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No. 59

In the Supreme Court of the United States

OCTOBER TERM, 1960

FRANK COSTELLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND ON MOTION TO AMEND THE PETITION FOR A WRIT OF CERTIORARI

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the Court of Appeals (R. 245–255) is reported at 275 F. 2d 355. The opinion of the District Court (R. 17–43) is reported at 171 F. Supp. 10.

JURISDICTION

The judgment of the Court of Appeals was entered on February 17, 1960 (R. 255–256). The petition for a writ of certiorari was filed on March 18, 1960, and the motion to amend the petition was filed on April 15, 1960. On May 16, 1960, the petition was granted

and the motion was assigned for hearing.[1] The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The following questions are presented on the writ of certiorari:

1. Whether the evidence is sufficient to establish that petitioner wilfully and falsely misrepresented a material fact—his occupation—during his naturalization proceedings.

2. Whether the government should have been barred from instituting this denaturalization proceeding against petitioner by the lapse of time since naturalization.

3. Whether some of petitioner's admissions as to his true occupation at the time of naturalization were tainted by wiretapping.

The following questions are presented by the motion for leave to amend the petition for a writ of certiorari:

4. Whether petitioner should be permitted to amend his petition for a writ of certiorari so as to raise belatedly the issue of *res judicata* which he contested before both lower courts but chose not to set forth in his original petition.

5. Whether a second denaturalization proceeding is barred by the failure of the District Court to specify, in the order dismissing the original denaturalization complaint, that the dismissal is without prejudice to

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[1] The hearing on the motion is to be consolidated with the argument on the merits in *United States* v. *Lucchese*, No. 57, this Term.

the filing of a new complaint, where the dismissal was entered at the direction of this Court for failure to file the affidavit of good cause with the complaint.

STATUTE AND RULES INVOLVED

8 U.S.C. 1451 (Section 340 of the Immigration and Nationality Act of 1952, 66 Stat. 260, as amended, 68 Stat. 1232) provides in part, as follows:

> (a) *Concealment of material evidence; refusal to testify.*
>
> It shall be the duty of the United States attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 1421 of this title in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively: * * *
>
> * * * * *
>
> (i) *Applicability of certificates of naturalization and citizenship.*
>
> The provisions of this section shall apply not only to any naturalization granted and to certificates of naturalization and citizenship issued under the provisions of this subchapter, but to

any naturalization heretofore granted by any court, and to all certificates of naturalization and citizenship which may have been issued heretofore by any court or by the Commissioner based upon naturalization granted by any court, or by a designated representative of the Commissioner under the provisions of section 702 of the Nationality Act of 1940, as amended, or by such designated representative under any other act.

Rule 12(b) of the Federal Rules of Civil Procedure provides, in pertinent part, as follows:

> (b) *How presented.*
>
> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party.
>
> * * *

Rule 41(b) of the Federal Rules of Civil Procedure provides:

> (b) *Involuntary dismissal: Effect thereof.*
>
> For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his

evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. In an action tried by the court without a jury the court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits.

* * * * *

STATEMENT

On May 1, 1958, the United States filed a denaturalization complaint (together with affidavits of good cause) against petitioner in the United States District Court for the Southern District of New York (R. 3–14). Following trial without a jury, the District Court vacated the court order admitting petitioner to citizenship and cancelled the certificate of naturalization issued pursuant thereto (R. 17–44). On appeal, the Court of Appeals affirmed.[2]

[2] The government had filed an earlier denaturalization complaint against petitioner on October 22, 1952, under 8 U.S.C. (1946 ed.) 738(a), the predecessor of the statute upon which this proceeding is founded. The District Court granted peti-

1. *The evidence of fraud.*

The government's complaint alleged that the order admitting petitioner to citizenship on September 10, 1925, and the certificate of naturalization had been "procured by the concealment of material facts and by wilful misrepresentation:" Specifically, the complaint alleged that petitioner had sworn on three separate occasions (in his preliminary form for petition for naturalization, during his oral testimony before a naturalization examiner, and in his petition for naturalization) that his occupation was "real estate," whereas his actual occupation was the illicit

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tioner's motion to dismiss the earlier complaint and to strike the affidavit of good cause, without prejudice to a renewal of the proceedings, on the ground that both the government's affidavit of good cause (which was filed somewhat after the complaint was filed) and its evidence were seriously tainted by wiretapping. *United States* v. *Costello*, 145 F. Supp. 892 (S.D.N.Y.). On appeal, the Court of Appeals reversed, holding that the government should have been given an opportunity to establish that its evidence was untained or otherwise admissible. *United States* v. *Costello*, 247 F. 2d 384 (C.A. 2). This Court granted the petition for a writ of certiorari and reversed, *per curiam*, on a ground not considered below—that the filing of the affidavit of good cause contemporaneously with the denaturalization complaint was a prerequisite to the institution of the suit (R. 17–18; *Costello* v. *United States*, 356 U.S. 256 (No. 494, O.T. 1957); see *Lucchese* v. *United States*, 356 U.S. 256 (No. 450, O.T. 1957); *Matles* v. *United States*, 356 U.S. 256 (No. 378, O.T. 1957)).

After remand, the government presented to the District Court a proposed order for dismissal "without prejudice." The District Court, however, felt constrained by the mandate of this Court merely to enter an order of dismissal which did not specify whether it was with or without prejudice. The government did not appeal from this order (R. 252–253).

purchase and sale of alcohol (R. 4–5); and that petitioner, in his petition for naturalization, had sworn that he would support and defend the Constitution and laws of the United States, whereas he was at that very time violating the laws of the United States by engaging in the illicit purchase and sale of alcohol (R. 5).

At the trial, there was no question that petitioner consistently claimed, during the preliminary naturalization process, that his occupation was "real estate" (Govt. Ex. 7–9), and that this process resulted in his naturalization (Govt. Ex. 9; R. 205). The evidence showing that petitioner was actually engaged in the illegal liquor traffic before and at the time of his naturalization may be summarized as follows:

During the period 1921–1923, petitioner worked for Emanuel Kessler who, until he received a 2-year sentence for violation of the National Prohibition Act, was engaged in the illegal importation of alcoholic beverages from Europe (R. 59–61). Kessler's boats would land about 500 cases of illicit liquor, each night, somewhere on Long Island, New York (R. 60–61). Petitioner and his brother, Edward Costello, were employed by Kessler to meet the boats and truck the liquor to hiding places for storage—either in a garage behind Edward Costello's home on Halsey Street, Long Island City, or in an old mansion in Long Island City which petitioner and his brother had purchased (R. 62–65, 69, see 70–72, 74, 76). Kessler would contact petitioner or Edward daily at their office, 405 Lexington Avenue, New York City, to arrange a meeting place for each night's activity

(R. 52–56, 58, 62–63, 76). The Costellos received about $6,000 each week from Kessler for their hauling and storage service (R. 65, 76–77). When Kessler went to jail in 1923, petitioner asked him "for some money so he could continue on." Kessler gave petitioner "either 100 or 200 cases" of liquor for that purpose (R. 68, 73).

During the period prior to December 1923, petitioner and his brother also stored liquor for Albert Feldman and bought and sold illegal liquor on their own account (R. 168–174). Occasionally petitioner would accept small lots of merchandise from Kessler in partial payment of the storage charges (R. 66). He disposed of 500 cases of liquor supposedly being stored for Kessler (R. 66–67, 175–176), 1,000 cases of liquor which he was holding on consignment for Feldman (R. 171–174), and he somehow reacquired from the government about $250,000 worth of Kessler's whiskey seized in a raid on petitioner's mansion-warehouse (R. 67–68). Petitioner, not Edward Costello, was "the business man" for their partnership (R. 176, see R. 73).

In the fall of 1925, petitioner and Harry Sausser (one of petitioner's character witnesses in his naturalization proceeding, see Govt. Exs. 7, 9, R. 201, 204) went to Frank Kelly, who was engaged in the importation of illegal liquor, and arranged to have several thousand cases of liquor transferred from a ship at sea to Kelly's vessel, an ocean-going schooner which was laying 100 miles off Long Island (R. 81–86, 93). The plan was to land the liquor in smaller boats at a later time (R. 85–87). In December 1925, peti-

tioner and Kelly employed Philip Coffey (who had originally arranged their introduction (R. 83)) to land the liquor stored on board Kelly's schooner (R. 152). Coffey was paid by petitioner's bookkeeper (R. 155, 158, 162).

Late in 1924 or early in 1925, Sausser became associated with petitioner, an association which continued until Sausser's death in 1926 (R. 113–116, 123). Petitioner and Sausser were heard to discuss the business aspects of "bootlegging," such as the type of whiskey to be purchased and the price to be paid (R. 120). Sausser's daughter (Helen Sausser) visited the Lexington Avenue office used by petitioner and her father on three or four occasions. Although "supposedly a real estate office," this location was actually the base of operations for their dealings in illicit alcohol (R. 116–117, 123, 131–134).

On July 20, 1938, in a statement given to James M. Sullivan, Special Agent of the Treasury Department, petitioner said that he had been in the liquor business "from 1923 or 1924 until about a year or two before Repeal". (R. 177–178).

In testimony before a federal grand jury on August 24, 1939, petitioner admitted that he had done "a little bootlegging," the last time around 1926 (R. 179–180).

In 1943, in testimony before a New York state grand jury and before a referee appointed by the Appellate Division of the Supreme Court of New York, petitioner stated that he had smuggled illegal alcohol into this country during prohibition and re-

ceived large sums of money from this activity (R. 184–185). During the period 1919 to 1932, petitioner reported an income of $305,000. Most of this income came from his illicit alcohol traffic (R. 187–188, 190–191). Petitioner made about $20,000–$25,000 in one real estate transaction during this time, using funds derived from "gambling or liquor" to finance the operation (R. 188–189).[3]

On February 15, 1947, while testifying before the New York State Liquor Authority, petitioner stated that he had engaged in bootlegging from 1923 to 1926 or 1927, that his headquarters was at 405 Lexington Avenue, and that his Canadian representative was Harry Sausser (R. 194–196).

A search of the records of the boroughs of Manhattan, Brooklyn, Queens, and the Bronx revealed that in 1922 petitioner purchased a piece of property in Queens from the Halsey Realty Corporation and conveyed it to his wife, Loretta B. Costello, in 1923

[3] Pursuant to the order of a New York state court, petitioner's telephone communications were intercepted during the period May 7, 1943 to November 1943. The grand jury interrogation was "precipitated" by a conversation between petitioner and a New York state judge, in the sense that "there would have been a grand jury interrogation [of petitioner] in any event, but the [intercepted] conversation * * * made necessary questioning at the time it took place" (R. 47, 49–52). However, no information relating to petitioner's activities before 1930 was derived from these wiretaps (R. 46), none of the interrogation regarding pre-1930 activity was based on or derived from wiretapping, and petitioner was not led to believe that the interrogator had learned of his earlier activities through wiretapping (R. 47–48). Petitioner was interrogated regarding his pre-1930 pursuits solely for the purpose of background (R. 51).

(R. 94–95, 201; Govt. Ex. 7). In 1924, the Koslo Realty Corporation purchased property in New York City and sold it on June 23, 1925 (R. 95, 99).[4] A purchase money mortgage on this property was released on December 21, 1925, and petitioner signed the release as president of the Koslo Realty Corporation (Govt. Ex. 25, R. 225–226). The Koslo Corporation also purchased several lots in the Bronx on August 12, 1925 (Govt. Exs. 19, 20, R. 209–212) and sold them on June 22, 1926 (Def. Ex. C, R. 231–232); purchased land in the Bronx from the Claire Building Corporation on October 26, 1925 (Govt. Exs. 21, 22, R. 213–216), and sold it to the R. G. & F. Corporation on July 15, 1926 (Def. Exs. A, B, R. 227–230). These latter transactions, however, were initiated several months after petitioner filed his petition for naturalization on May 1, 1925 (Govt. Ex. 9, R. 204).

2. *The holding of the District Court.*

a. The District Court found that the evidence was "clear, unequivocal and convincing" that petitioner had procured his order of naturalization by wilful misrepresentation of material facts and by fraud, in that he had stated his occupation was real estate, while his true occupation was bootlegging, and that he swore in his oath of allegiance to support and defend the Constitution and laws of the United States, while at the time he was actually engaged in violating the Constitution and laws of this country (R. 21–22, see R. 33). The District Court summarized much of the

[4] Apparently this was the beginning of the transaction referred to by petitioner when he testified before the New York grand jury in 1943 (R. 95, 188, Govt. Ex. 18, R. 208).

evidence set forth above to support its conclusion (R. 23–26), noting that "[i]f the Government rested on the testimony of the individual witnesses it might be necessary to appraise their evidence more carefully, but in view of the fact that the defendant has frankly admitted, on a number of occasions, that in the period around 1925 and prior thereto he was engaged in bootlegging, the testimony of the individual witnesses is, if anything, merely cumulative" (R. 26).

With specific reference to the question of whether petitioner was actually occupied in real estate, or could reasonably think that such an answer was an honest answer to the question asked regarding occupation, the District Court pointed out (R. 27) that:

> * * * prior to the time that Costello had sworn that his occupation was "real estate" he personally had engaged in only one real estate transfer in his own name; and the [Koslo] corporation in which he was a principal engaged in only one transaction and that to the extent of purchasing one parcel of real estate. During the same period, * * * he was actively engaged in bootlegging on a large scale and with very profitable results. * * * The term "occupation" would commonly be understood to refer to the income producing activity to which a person devotes the major portion of his time and from which he derives the major portion of his income. * * * Obviously if he were engaged in an illegal occupation the Government would like to know that to determine whether he properly should be admitted to citizenship. Costello, confronted with the question and the fact that his occupation was an illegal one, had one

of two choices in giving his answer. If he had told the truth he would have said that his occupation was bootlegging; his application for citizenship would then have been denied.[5] When he answered that his occupation was real estate he was giving a false and misleading answer and was therefore engaging in a willful misrepresentation in order to secure his naturalization certificate.

b. The trial judge rejected petitioner's contention that his admissions as to his prior occupation as a dealer in illicit alcohol were tainted by wiretapping, finding that the government did not learn anything regarding his activities in violation of the prohibition laws from or as a result of wiretapping. Although state officers intercepted petitioner's telephone communications in 1943, and the New York grand jury interrogation took place when it did because of what was thus learned, petitioner's testimony as to his bootlegging activities was elicited for the purposes of background only and was collateral to the purposes of the interrogation (R. 39–42). See fn. 3, *supra*, p. 10. The trial judge concluded that "[t]he evidence received in this case was not wiretap evidence nor was it the fruit of wiretap evidence" (R. 42).

c. The District Court also expressly rejected defense counsel's contention that the dismissal of the

[5] On the question of the materiality of the misrepresentation, the District Court elsewhere noted (R. 22–23) that the judge who admitted petitioner to citizenship in 1925 had, in 1926, denaturalized a person who, during the five years preceding his naturalization, had been convicted of violating the prohibition laws. See *United States* v. *Mirsky*, 17 F. 2d 275 (S.D. N.Y.).

prior denaturalization proceeding barred the present proceeding, holding that the earlier action was dismissed for failure by the government to comply with what the trial judge regarded as a jurisdictional requirement—contemporaneous filing of an affidavit of good cause and the complaint for denaturalization (R. 34–35).

3. *The ruling of the Court of Appeals.*

a. The Court of Appeals did not pass upon the District Court's second ground for decision on the merits (that petitioner falsely swore that he would support and defend the Constitution and laws of the United States), holding that the charge of wilful misrepresentation and fraud was amply supported by the evidence of petitioner's false statements regarding his occupation (R. 251–252). It said (R. 250–251):

> Of course one has to begin a new occupation at some point of time, and at the outset there necessarily is not a great deal of evidence as to such activity. The evidence relating to Costello's real estate dealings is at best scanty. * * * If there was any further evidence along this line [as to real estate transactions], it would be peculiarly within the knowledge of Costello, and his failure to produce evidence of such activity warrants the inference that there was none such.
>
> We think it obvious that a worldly-wise man such as Costello must have realized that his real occupation was bootlegging and that his dabbling in real estate was but "dust in the eyes" to conceal his real occupation. * * * Surely it is conceivable that an applicant might believe that the answer called for no more than a dis-

> closure of some "legal occupation". There is no evidence in the record that Costello so believed. * * *

b. The Court of Appeals also concluded that the dismissal of the prior complaint was not a judgment on the merits for the purposes of Rule 41(b), *supra*, pp. 4–5. It reasoned that this Court, in directing a dismissal in *Costello* v. *United States*, 356 U.S. 256, *supra*, pp. 5–6, fn. 2, "did not suppose that it was directing a determination on the merits," since in both *Costello* and *United States* v. *Zucca*, 351 U.S. 91, the dismissals originally ordered by the District Court were dismissals without prejudice (R. 254, see 252–254). The Court of Appeals pointed out that the District Court, considering that it was bound by the terms of the mandate merely to dismiss the complaint, did not determine that its dismissal on remand should be regarded as a judgment on the merits and did not purport to exercise any discretion (R. 253–254). The appellate court summed up its thinking as follows (R. 254–255):

> It seems to us that Rule 41(b) should be interpreted as applying only to cases in which the trial judge is exercising some discretion and is not merely acting mechanically pursuant to the direction of a superior court. There must be a rule that a bare "dismissal" is to be interpreted as either with or without prejudice, and 41(b) provides this rule in all cases where the district court has a real discretion in the matter. But there is obviously no such need where the trial court's disposition of the case has been predetermined by a superior court. It would

be a violation of the intention of all the courts concerned if the dismissal of the earlier complaint were held in this case to be a judgment on the merits. Appellant's arguments exalt pure technicalities to a wholly unwarranted degree. * * *

SUMMARY OF ARGUMENT

I

The evidence is sufficient to establish that petitioner wilfully and falsely misrepresented a material fact—his occupation—during his naturalization proceedings.

A. Petitioner was asked to state his occupation at three separate points in the proceedings prior to his naturalization. Three times he replied that his occupation or business was real estate. The answers which petitioner gave to these straight-forward questions were, as both lower courts found, shown by clear, unequivocal, and convincing evidence to have been false.

On at least five different occasions since his naturalization, petitioner has told different federal and state agents or agencies that he regularly dealt in illicit liquor before, during, and after his naturalization. The government also presented other evidence showing that, from 1921 until long after the filing of his petition for naturalization on May 1, 1925, petitioner was continuously engaged in the illegal alcohol traffic, and that he and his brother grossed as much as $6,000 each week from that activity. Petitioner had commercialized his unlawful actions to the point of purchasing trucks and warehousing facilities, renting an office as

a base of operations, and hiring a foreign representative.

As opposed to the evidence that petitioner was employed in the illegal alcohol traffic, there was proof that petitioner purchased one piece of property in his own name in 1922, and that the Koslo Realty Corporation, in which he had some interest, purchased certain property in 1924 with money derived from petitioner's liquor and gambling activities. As of May 1, 1925, the date of his petition for naturalization, petitioner had not earned any money from real estate transactions. The "real estate" office which petitioner supposedly operated was actually a "cover" for his illegal business. The lower courts thus properly concluded that petitioner's sporadic real estate ventures were not his true occupation at that time, and that there was abundant evidence showing that he was actually engaged in the business of violating the prohibition laws when he was naturalized.

B. 1. The lower courts were also fully justified in concluding that petitioner's claim that his occupation was "real estate" was a knowing falsification. It is inherently unreasonable that a person would regard a business (real estate) from which he has not derived any money as his occupation, when at the same time he was earning large sums of money from commercialized illicit actions. Moreover, the evidence shows that petitioner was knowingly using the designation of "real estate" to cover up his bootlegging operations. During the naturalization process, petitioner twice named Harry C. Sausser as one of his

expected witnesses, and gave Sausser's occupation as "real estate." In fact, however, Sausser was petitioner's Canadian representative in the purchase of alcoholic beverages for later illegal importation. The term "real estate" was a conscious protective euphemism for Sausser's occupation, just as it was for petitioner's.

Petitioner's contention that he might have interpreted the questions as to occupation to refer only to the legal occupation of real estate, based as it is on realty transactions which took place *after* he filed his petition for naturalization, is not well founded. All that is material to this case is whether or not petitioner was, or could reasonably believe that he was, occupied in real estate as of May 1, 1925 (the date of his petition for naturalization) when he for the third time officially so stated. As of that date, petitioner had purchased a house and conveyed it to his wife, and the Koslo Corporation had made one purchase of property. Nothing else in the way of realty dealings had taken place. Petitioner's occupation was not "real estate" at the times in issue here; it was bootlegging. On the facts of this case, if petitioner thought he had to list only his legal occupation, he should have answered "none," since the facts show that he had no legal occupation. When, therefore, on three different occasions petitioner stated that his occupation was real estate, his answers were wilfully false.

2. Petitioner's reliance upon *Nowak* v. *United States*, 356 U.S. 660, and *Maisenberg* v. *United States*, 356 U.S. 670, is misplaced. In those cases,

the Court held that the question which the defendants answered incorrectly could easily have been interpreted by them "as a two-pronged inquiry relating simply to anarchy" rather than as an inquiry as to membership in either an anarchistic or a communistic organization (356 U.S. at 664). In the Court's view, that conclusion flowed from the vague and misleading phraseology of the question itself. Here, however, there was no such possibility of confusion. The question answered falsely by petitioner was very simple, and he answered that question falsely on three occasions, at three separate points in the naturalization process. Unlike *Nowak* and *Maisenberg*, the decision here for review does not present broad social judgments—judgments lying close to opinion regarding the whole nature of our government and the duties and immunities of citizenship. It involves only the factual question of whether a person can reasonably be expected to know how he makes his living.

C. Petitioner's concealment of his true occupation mispresented a material fact. Petitioner's character was, in part, the test of his fitness for citizenship. This in turn required consideration of his then present (1925) and past behavior as one evidentiary criterion for assessing his character. When petitioner falsified as to his occupation, he foreclosed intelligent inquiry as to whether the behavior shown by that occupation was consistent or inconsistent with good moral character, an evaluation which was for the naturalization court, not the petitioner.

The materiality of petitioner's false statement is clearly shown when it is considered in the light of the fact that he engaged in flouting the Eighteenth Amendment and its implementing laws as a means of livelihood over a period of years. The evidence shows massive involvement for massive profits. It cannot be denied that the disclosure of petitioner's true occupation would very likely have led the District Court to refuse naturalization. The falsification was therefore highly material.

II

The lapse of time since naturalization did not bar the government from instituting denaturalization proceedings against petitioner.

A. Congress has not provided a limitation period applicable to denaturalization proceedings. Subsection (i) of Section 340 of the Immigration and Nationality Act of 1952 (8 U.S.C. 1451(i)) expressly provides that the authority to cancel certificates of naturalization procured by wilful misrepresentation "shall apply not only to any naturalization granted * * * under the provisions of this subchapter, but to any naturalization heretofore granted by any court * * *." In terms, then, Congress has affirmatively decided that naturalization proceedings are not to be barred by the lapse of any stated period of time, and that the revocation authorization in the 1952 Act should have retroactive application.

Congress made this choice deliberately, since the principle of retroactive application (without time limitation) of the authority to denaturalize has been

included in the statutes governing denaturalization proceedings ever since 1906. This Court in the past has accorded its natural meaning to the Congressional language authorizing retroactive application of the power to denaturalize, and has relied upon the natural meaning of the language of Section 340(a) of the present Immigration and Nationality Act to reach the conclusion that an affidavit of good cause must be filed with the complaint for denaturalization. Similar treatment in this case leads to the conclusion that Congress has placed no time limitation upon the institution of denaturalization proceedings.

B. 1. On general principles, this suit should not be barred by laches. This Court has consistently held that the doctrine of laches is not imputable to the government in enforcing its rights, on the ground that "the public interest should not be prejudiced by the negligence of public officers, to whose care they are confided." *United States* v. *Knight,* 39 U.S. (14 Pet.) 301, 315. Thus, unless Congess has expressly manifested a contrary intention, the United States, asserting rights vested in it as a sovereign government, is not bound by any statute of limitations.

2. (a) Laches is principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the parties. Want of due diligence by the plaintiff may make it unfair to pursue the defendant, but fraudulent conduct on the part of the defendant may have prevented the plaintiff from being diligent and may make it unfair to bar appeal

to equity by the defrauded party because of mere lapse of time. It is especially unfair to bar the suit because of mere lapse in a case of time where the fraud is worked on the court itself, for the courts have always been willing to go very far to set aside fraudulently begotten judgments. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud.

(b) These principles are applicable to denaturalization proceedings. The 225 examiners and clerks who handled 152,000 naturalizations in the year in which petitioner sought citizenship (1925) had to rely upon the truthfulness of the statements made by the applicants, and it was inevitable that some frauds would occur which would not be discovered until years later. In view of the large numbers involved, it is not reasonable to hold the United States as an entity responsible for immediately correlating every piece of information that may come into the hands of one of its many agencies. Congress, when it first authorized a denaturalization procedure, had in mind the extensive frauds then current in citizenship proceedings, and deliberately rejected a policy of time limitation. For the same reasons, this Court should not adopt a doctrine of laches which would nullify the Congressional decision, especially since the defendant is protected against the dangers that may result from delay by the heavy burden of proof which the government must sustain in making out its case for denaturalization. So long as the government can show by clear and convincing evidence that the defendant obtained

the privileges of citizenship by fraud, it ought to be permitted to do so.

3. Applying appropriate precedents, the lower courts have uniformly refused to apply any time limitations to denaturalization actions.

4. Even if a doctrine of laches might be applicable in some cases, it would not be available to petitioner in this case, for he can show no prejudice resulting from the delay. The issue in this case concerns the falsity of petitioner's answers as to his occupation. The primary proof that petitioner's answers were wilfully false flows from his own admissions made subsequent to his naturalization. The fact, then, that the witnesses to his naturalization and the naturalization examiners who processed his application have died does not affect the proof in his case.

III

Petitioner's contention that some of his sworn admissions (on which the trial court relied) were tainted by wiretapping is not well founded, for the evidence shows that there was no causal connection between the wiretapping and the government's evidence in this case which related, of course, to petitioner's activities before his naturalization in 1925. The record demonstrates that if petitioner's telephone messages had not been monitored in the 1940's he would have been called before a state grand jury at a time later than the time when he actually appeared, and in connection with another matter. But it is clear from the evidence that petitioner would have been called before the grand jury, in any event, that the state authorities had not learned

anything about petitioner's activities before 1930 through wiretapping, that they did not give petitioner cause to believe that they had learned of those activities through wiretapping, and that the questioning as to petitioner's activities before 1930 was collateral to the subject of investigation. Therefore, such connection as existed between the wiretapping and petitioner's admissions to state authorities that he engaged in the illicit alcohol traffic in years prior to 1930 had become too attenuated to call for application of the "fruits of the poisonous tree" doctrine of *Nardone* v. *United States*, 308 U.S. 338.

IV

A. An affidavit of good cause was not filed simultaneously with the complaint in the prior denaturalization suit against petitioner. This Court reversed the judgment of the Court of Appeals for this reason and remanded the cause to the District Court with directions to dismiss the complaint. The District Court felt constrained by the mandate of this Court merely to enter an order of dismissal which did not specify whether it was with or without prejudice. The government did not appeal from this order.

After the present, separate, denaturalization action had been instituted in the District Court, petitioner moved to dismiss the complaint on the ground that the dismissal of the prior proceeding was an adjudication upon the merits which barred the instant action on principles of *res judicata*. The District Court held, however, that the dismissal of the prior action was for lack of jurisdiction in the sense that

that term is used in Rule 41(b), F. R. Civil P., *supra*, pp. 4–5, which provides that "[u]nless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits." On appeal, petitioner renewed his contention that the dismissal of the prior action operated as a dismissal with prejudice and therefore barred the present suit. The Court of Appeals held that Rule 41(b) is limited to cases where the trial judge has discretion as to the terms of the order to be entered, and not to orders of dismissal entered at the command of a higher court. It went on to rule that it would violate the intention of all of the courts concerned if the dismissal of the earlier complaint was held in this case to be a judgment on the merits.

Petitioner did not attack the ruling of the Court of Appeals, that the prior dismissal failed to bar the present action, in his petition for a writ of certiorari. His alleged reason for doing so a month later in his motion to amend the petition was that the Solicitor General, by filing a petition for certiorari in *United States* v. *Lucchese*, No. 57, this Term, had indicated that the nature and effect of dismissals entered pursuant to the mandate of a higher court raise serious questions which should be resolved by this Court. However, as appears from our petition and brief in *Lucchese*, the government has consistently taken the position in *Lucchese* that it was merely attempting to

protect its rights in the event of an adverse decision by this Court in the present case, if petitioner's certiorari petition should raise, and this Court accept, the *res judicata* issue. We did not consider the issue worthy of review in itself. There is therefore no reason to relieve petitioner of the consequences usually flowing from a failure to raise an issue of which he is fully aware.

V

In any event, a second denaturalization proceeding is not barred by the failure of the District Court to specify, in the order dismissing the original denaturalization complaint, that the dismissal is without prejudice to the filing of a new complaint, where the dismissal was entered at the direction of this Court for failure to file the affidavit of good cause with the complaint.

A. 1. In one sense, "jurisdiction" refers to those fundamental matters which may always be questioned by one of the parties, even on collateral attack. The failure to file an affidavit of good cause is not the kind of condition which goes to the core of the denaturalization proceeding so that a judgment rendered without compliance therewith would be subject to collateral attack as beyond the competence of a district court.

"Jurisdiction," however, is a term also applied to conditions precedent to a decision by the federal court on the merits of the controversy which, if raised in the original action, bar a decision on the merits, even though lack of compliance therewith will not subject a final judgment to collateral attack. This Court has

called such conditions precedent *quasi*-jurisdictional facts.

The failure to file an affidavit of good cause at the time when the complaint is filed in the denaturalization suit is a defect of this character. Like lack of diversity of citizenship and failure to claim damages in an amount greater than the statutory minimum, it is sufficiently jurisdictional to be available to the defendant so long as the case pends on direct review, even though not a defect which would render a judgment subject to collateral attack.

2. The phrase "lack of jurisdiction" as used in Rule 41(b), F. R. Civil P., *supra*, pp. 4–5, encompasses dismissals for *quasi*-jurisdictional defects such as the absence of an affidavit of good cause. The rule is directed toward the regulation of practice in a pending case and is naturally read as relating to those matters which constitute the "jurisdiction" of the court to proceed with the pending case, rather than as being limited to those basic jurisdictional matters which are always available, even on collateral attack.

Moreover, the failure to file an affidavit of good cause was the basis for a motion to dismiss for lack of "jurisdiction of the subject matter of the action" in *Lucchese* v. *United States*, 356 U.S. 256, and *United States* v. *Diamond*, 356 U.S. 257. This Court's ruling in those cases was a holding that such motions for lack of "jurisdiction of the subject matter" should have been granted. The order of dismissal pursuant to the mandate of this Court was therefore a dismissal for "lack of jurisdiction" under Rule 41(b).

B. The Court of Appeals' conclusion that Rule 41(b) applies only to rulings where the District Court purports to exercise some discretion is supported by the logic of the rule itself. Rule 41(b) expressly treats three situations as grounds for "dismissal under this subdivision." In all of these situations, the trial court is called upon to exercise a measure of discretion, and the defect alleged, if shown to exist, is sufficiently serious to warrant judgment on the merits against the plaintiff. And other dismissals "not provided for in this rule," but bound by its terms as to prejudice, also involve the exercise of discretion. Here, the district judge believed that he lacked power to go beyond the words of this Court's mandate at all, and entered the order of dismissal as a purely mechanical act unrelated to the merits of the case. Rule 41(b) ought not to apply to such an order.

ARGUMENT

I

THE EVIDENCE IS SUFFICIENT TO ESTABLISH THAT PETITIONER WILFULLY AND FALSELY MISREPRESENTED A MATERIAL FACT—HIS OCCUPATION—DURING HIS NATURALIZATION PROCEEDINGS

On the issue of fraud, petitioner has attempted to meet the government's case in two ways. First, he has discussed the evidence as though it really did provide the basis for an inference that he was engaged in real estate as an occupation (Pet. Br. pp. 20–24), ignoring the fact that the real estate transactions upon which he relies for this inference occurred at a time subsequent to his misrepresentations and false state-

ments during the naturalization process. Then he treats this case as though the evidence shows that he had two occupations—one a course of criminal conduct, the other a legitimate endeavor—and argues that there can be no misrepresentation where an applicant for naturalization, in good faith, sets forth a legitimate occupation which he pursues on at least a part-time basis (*id.*, pp. 25–29). We show, however, that when petitioner sought citizenship, and for many years before that time, the illicit alcohol traffic was his only occupation, and that he well knew what his occupation was at the time when he initiated his naturalization process. Hence, his misrepresentations as to his occupation were knowingly false and were material to his admission to citizenship.

A. *There was an abundance of evidence showing that, at the time of his naturalization, petitioner followed the illegal alcohol traffic as an occupation, and was not occupied in real estate.*

When petitioner filled out his preliminary form for petition for naturalization, one of the questions which had to be completed was "My present occupation is ----------." Petitioner inserted the words "Real Estate" (Govt. Ex. 7, R. 200). When examined under oath by the naturalization examiner, petitioner stated that his business was "Real Estate" (Govt. Ex. 8, R. 202). On May 1, 1925, when he submitted his petition for naturalization, petitioner answered the second question as follows, "My occupation is *Real Estate*" (Govt. Ex. 9, R. 204). There was nothing vague, complicated or confusing about these questions regarding petitioner's business or occupation. They

simply asked petitioner to describe, as the District Court put it, the "income producing activity to which [petitioner] devote[d] the major portion of his time and from which he derive[d] the major portion of his income" (R. 27). The answers which petitioner gave were, as both lower courts found, shown by clear, unequivocal, and convincing evidence to have been false.

On at least five different occasions since his naturalization, petitioner has told different federal and state agents or agencies that he dealt in illicit liquor before, during, and after his naturalization. Petitioner was specific as to the dollar volume of his operations. According to his own sworn testimony, he reported an income of $305,000 for the period 1919–1932, an average of over $23,000 each year.[6] Almost all of this came from his illegal traffic in alcohol. There was other evidence that petitioner and his brother grossed as much as $6,000 each week in 1922–1923 from their criminal activities. The scale of their activities was sufficiently large so that they had illicit liquor valued at $250,000 on hand at the time of a police raid on one of the warehouses which they operated for Kessler. *Supra*, pp. 7–10.

Petitioner's bootlegging activities did not terminate when Kessler went to prison at the end of 1923. To the contrary, petitioner borrowed illicit liquor from Kessler in order to stay in business, took on Sausser as his Canadian representative, and engaged

[6] Petitioner did not give these figures casually, or without reflection, since they were taken from the state income tax returns which he filed in 1936 for the years in question (R. 187–188).

in elaborate transactions for the sole purpose of importing illegal alcohol. Moreover, there was no question but that petitioner dominated the working arrangement which he had with his brother. As the witness Kessler put it, "My main trust was Frank Costello. Eddie Costello could not hold a conversation with anybody for ten minutes" (R. 73).

As opposed to the evidence that petitioner was employed in the illegal alcohol traffic, there was proof that petitioner purchased one piece of property in Queens County, New York, in his own name in 1922, and that a corporation in which petitioner had some interest (Koslo Realty Corporation) purchased certain property late in 1924. There was testimony that petitioner and his brother purchased an old mansion in Long Island City for use as a warehouse for liquor. Long Island City is located in Queens County, so the 1922 real estate transaction may have been undertaken for the purpose of advancing petitioner's illegal dealings. The property in Long Island City may also have been purchased as a residence, since it was conveyed to petitioner's wife in 1923. At the least, there was no evidence that petitioner purchased it either as an investment or for speculative purposes. As for the 1924 purchase by the Koslo Realty Corporation, that property had not been sold as of May 1, 1925, the date of petitioner's petition for naturalization, and the $20,000–$25,000 which petitioner later said he received as profit from the sale was as yet unrealized. The very money which petitioner put into the latter real estate purchase was derived from his liquor and gambling activities. The evidence showed that the

"real estate" office which petitioner supposedly operated at 405 Lexington Avenue, New York City, was simply a "cover" for petitioner's illegal business and was actually petitioner's base of operations for his illicit alcohol traffic.

The lower courts thus properly concluded that petitioner's sporadic real estate ventures were not his true occupation, and that he was actually engaged in the business of violating the prohibition laws when he was naturalized.

B. *Petitioner knew that he was required to disclose his true source of livelihood when asked to state his occupation, even though that occupation was an illegal one.*

1. The lower courts were also fully justified in concluding that petitioner's claim that his occupation was "real estate" was a knowing falsification. First of all, it is inherently unreasonable that a person would regard a business (real estate) from which he has not derived any money as his occupation, when at the same time he was earning large sums of money over a period of years from his illicit actions and had commercialized those actions to the point of maintaining an office, employing a bookkeeper assistant, and purchasing trucks for the specific purpose of advancing his liquor dealings.

Moreover, as set forth above, the evidence shows that petitioner was knowingly using the designation of "real estate" to cover up his bootlegging operations. It is significant that petitioner, in his preliminary form for petition for naturalization and during his

examinatio nder oath, named Harry C. Sausser as one of his expected witnesses, and listed Sausser's occupation as "Real Estate" (Govt. Exs. 7, 8, R. 201, 202). As a matter of fact, however, according to petitioner's later sworn statement and the testimony of Sausser's daughter, Sausser was petitioner's Canadian representative in the purchase of alcoholic beverages which were later illegally imported into the United States. The term "real estate" was a conscious protective euphemism for Sausser's occupation, just as it was for petitioner's.

Petitioner points to real estate transactions to which he was a party, in one way or another, apparently believing that they tend to make the considerable body of evidence against him less credible. He refers (Brief, pp. 21–22) to purchases and sales made during 1925 and 1926 by the Kosfo Corporation, and draws the inference that some of the property was improved between purchase and sale, but nowhere does he squarely face up to the fact that all of these transactions took place some time *after* he filed his preliminary form, appeared before the examiner, and filed his petition for naturalization. Petitioner's contention that he might have interpreted the questions as to occupation to refer only to the legal occupation of real estate (Brief, p. 26) is thus not well founded. It may be that he began to deal seriously in real estate after his naturalization so as to gain investment opportunities for his illegal profits from the liquor business. It may be that petitioner simply wanted to increase the density of the "cover" for his illicit

traffic. But this misses the mark so far as the issue of knowing, wilful, falsification in the naturalization proceedings is concerned. All that counts is whether or not petitioner was, or could reasonably believe that he was, occupied in real estate as of May 1, 1925 (the date of his petition for naturalization) when he for the third time officially so stated. As of that date, petitioner had purchased a house and conveyed it to his wife, and the Koslo Corporation had made one purchase of property. Nothing else in the way of realty dealings had taken place. Petitioner's occupation was not "real estate" at the times in issue here.

Petitioner argues his case as though the facts show, and the lower courts found, that he had two occupations, one legal and one illegal (Brief, pp. 28-29). However, the facts show and the lower courts found that petitioner had only one occupation, and that one an illegal activity. While the Court of Appeals noted that "it is conceivable that an applicant might believe that the answer called for no more than a disclosure of some 'legal occupation'" (R. 250–251), it also noted that there was no evidence that petitioner so believed.[7]

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[7] We do not think that this can be construed as a statement that petitioner's failure to take the stand warranted the inference that petitioner understood the question to require disclosure of all occupations. Rather, we read the language of the Court of Appeals to mean that, though one might conceive of a case in which an applicant had misunderstood the question, in this case the government's uncontradicted evidence (discussed *supra*, pp. 29–33) showed that petitioner had not misunderstood the question and petitioner had not presented any evidence to refute the government's showing.

Petitioner extends the opinion of the court below by his assertion that the Court of Appeals concluded that his failure to testify

Actually, on the facts here, if petitioner thought he had to list only his legal occupation, he should have answered "none", since the facts show that he had no legal occupation. The unchallengeable evidence shows that petitioner was engaged for a long period of time in an illegal business from which he earned large amounts of money, and that his real estate dealings as of May 1, 1925 were few in number, devoid of profit, and possibly undertaken to advance his illicit warehousing activities. He therefore was not actually occupied in real estate. When, therefore, on three different occasions in the naturalization proceedings petitioner stated that his occupation was real estate, his answers were wilfully false.

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warranted the inference that petitioner understood the question as to occupation to call for disclosure of all income-producing activities, legal or illegal (Brief, pp. 29–33). The Court of Appeals noted that, if petitioner had engaged in any real estate transactions other than those reflected in this record, those other transactions would be peculiarly within petitioner's knowledge, and his failure to prove them warranted the inference that there were none (R. 250). Proof by petitioner would not have required taking the stand. If other real estate transactions existed, they could be proved in some manner other than through petitioner's testimony, such as documentary evidence. The rational connection between petitioner's failure to show other dealings and the inference that there were no other real estate transactions is sufficiently strong, and the comparative convenience of producing additional evidence sufficiently favorable to petitioner, to render the inference permissible even in a criminal case (which this was not). See *Morrison et al* v. *California*, 291 U.S. 82, 87–90; compare *Tot* v. *United States*, 319 U.S. 463, 467–470; *Speiser* v. *Randall*, 357 U.S. 513, 523–524.

The District Court found the evidence to be clear and convincing[8] that petitioner's occupation at the time when he applied for naturalization "was not 'real estate' but was bootlegging", and that petitioner wilfully misrepresented that his occupation was real estate to secure his naturalization (R. 21–22, 28.) The Court of Appeals was "more than satisfied that the findings by the district court which will sustain a cancellation of the certificate of naturalization are the only findings possible on the evidence, and that they fulfill the strictest requirements of proof" (R. 248).

2. Petitioner's reliance (Brief, pp. 25–26) upon *Nowak* v. *United States*, 356 U.S. 660, and *Maisenberg* v. *United States*, 356 U.S. 670, is misplaced. In those cases, the Court held that the question which the defendants answered incorrectly could easily have been interpreted by them "as a two-pronged inquiry relating simply to anarchy" rather than an inquiry as to membership in either an anarchistic or a communistic organization (356 U.S. at 664; see 356 U.S. at 672). The question at issue in those cases read as follows (356 U.S. at 663):

> 28. Are you a believer in anarchy? * * * Do you belong to or are you associated with any organization which teaches or advocates anarchy or the overthrow of existing government in this country? * * *

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[8] This is the proper test in denaturalization. *Schneiderman* v. *United States*, 320 U.S. 118, 125, 135; *Baumgartner* v. *United States*, 322 U.S. 665, 670; *Knauer* v. *United States*, 328 U.S. 654, 657; *Nowak* v. *United States*, 356 U.S. 660, 663; *Maisenberg* v. *United States*, 356 U.S. 670, 672.

Although the two halves of the second part of the question, referring to "anarchy" and "overthrow", were phrased disjunctively as a matter of syntax, the Court concluded that it was sufficiently misleading to make "it not implausible to read the question in its totality as inquiring solely about anarchy"—a conclusion buttressed by the fact that the first part of Question 28 referred solely to anarchy, and the second portion of the question did not expressly mention communism or other ideologies incompatible with peaceful political change (356 U.S. at 664; see *Barenblatt* v. *United States,* 360 U.S. 109, 128). Here, however, there was no such possibility of confusion. The question answered falsely by petitioner was very simple: "My present occupation is ———.", and he answered that question falsely, not once but three times, at three separate points in the naturalization process.

There are further reasons for distinguishing *Nowak* and *Maisenberg.* In *Nowak,* no evidence was introduced tending to show that the defendant actually understood Question 28 as calling for disclosure of his membership in the Communist Party. Instead, the government was driven to rely upon the inference that Nowak, an important Communist Party functionary, must have known that the deportation and exclusion statutes applied to aliens who believe in or advocate the violent overthrow of our present form of government, and that the Communist Party advocated such a policy. The Court regarded this inference as untenable (356 U.S. at 665, fn. 3). Here, there was an

abundance of evidence to show that petitioner well knew what his occupation was during the prohibition era. And lastly, unlike *Nowak*, the "decision here for review * * * [does not present] broadly social judgments—judgments lying close to opinion regarding the whole nature of our Government and the duties and immunities of citizenship." *Baumgartner* v. *United States*, 322 U.S. 665, 671. It involves only the factual question of whether a person can reasonably be expected to know how he makes his living—*i.e.*, what is his occupation.[9]

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[9] Petitioner's reliance (Brief, pp. 26-28, 30) upon other recent decisions, such as *United States* v. *Kessler*, 213 F. 2d 53 (C.A. 3); *Baghdasarian* v. *United States*, 220 F. 2d 677 (C.A. 1); *Boufford* v. *United States*, 239 F. 2d 841 (C.A. 1); *United States* v. *Minerich*, 250 F. 2d 721 (C.A. 7); and *United States* v. *Prahici*, 274 F. 2d 289 (C.A. 2), seems even less appropriate.

In *Kessler*, the evidence established that the defendant had stated during the naturalization proceedings that she had never been arrested for a violation of any law because her seventeen arrests for "obstructing highway", all of which resulted in her discharge, were actually arrests for picketing during a labor dispute, a lawful activity. Moreover, there was no such offense as "obstructing highway" in the jurisdiction where the arrests occurred. Contrast that with this case, where petitioner attempts to substitute ingenious argument for solid proof of the lack of a wilful misrepresentation.

In *Baghdasarian* v. *United States*, the holding was that the defendant was never a member of the Communist Party and that her husband's enrollment of her as such, without her knowledge or consent, did not make her a member (*id.*, 220 F. 2d at 679-680). Here, there is no question but that petitioner was personally responsible for the false answers relied on by the government.

Boufford v. *United States*, was a criminal prosecution for a false statement made in a preliminary form for petition for naturalization. The defendant stated that he had been married only once, whereas he had actually also contracted a second

In any denaturalization case where the defendant contends that his misrepresentation was made inadvertently—that his statement was not a knowing falsification—there is no automatic way for the government to establish the contrary. But "it has been some time now since the law viewed itself as impotent to explore the actual state of a man's mind," *Smith* v. *California*, 361 U.S. 147, 154. This is so even where it is alleged that the defendant fraudulently misrepresented his mental intent to forswear all foreign allegiances at the time of naturalization. See *Knauer* v. *United States*, 328 U.S. 654. Thus, federal courts have held the evidence sufficient to sustain the decree of denaturalization where the defendants concealed

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bigamous marriage. The Court of Appeals held (239 F. 2d at 845-846) that there was an issue as to whether defendant understood this question as referring only to valid marriages, and reversed because the trial court had refused to permit the jury to pass on this issue. Granted that an issue of wilfulness may be raised by petitioner's argument, to the extent that there was such an issue here it was resolved against petitioner by both lower courts.

In *United States* v. *Milwich*, unlike this case, defendant's statements that he had never been arrested were true when made; the question on the issue of fraud was whether he had a duty to disclose arrests occurring immediately prior to the formal court action of naturalization.

In *United States* v. *Profaci*, the defendant had not revealed his arrests in the land from which he emigrated, but the Court of Appeals held that the government's proof was sufficiently vague to permit the inference that Profaci may have been asked only whether he had ever been arrested in the United States. The Court of Appeals contrasted the case before it with cases like this, where "it is possible to infer an intent to falsify and deceive from the mere untruthful response to a question, the clarity of which leaves little or no room for a reasonable explanation of misunderstanding". 274 F. 2d at 292.

their criminal records, despite claims by the defendants that immigration authorities told them that their records did not matter unless they had "served time" or been convicted of a felony (*United States* v. *Montalbano, et al.*, 236 F. 2d 757, 759 (C.A. 3), certiorari denied *sub nom. Genovese* v. *United States*, 352 U.S. 952), or that the concealment was not wilful (*United States* v. *Gelbert*, 121 F. Supp. 414, 416 (N.D. Ill.); *United States* v. *Brass*, 37 F. Supp. 698, 699–700 (E.D.N.Y.)); where the defendant misrepresented his marital status, despite his claim that the misrepresentation was not wilful (*Lumantes* v. *United States*, 232 F. 2d 216, 217 (C.A. 9), affirming *United States* v. *Lumantes*, 139 F. Supp. 574 (N.D. Cal.); *United States* v. *Intrieri*, 36 F. Supp. 374, 375 (M.D. Pa.); *United States* v. *Zaltzman*, 19 F. Supp. 305 (W.D.N.Y.)); and where the defendant aided another alien in illegally becoming a citizen, knowing that the other alien was illegally in this country, despite the contention that the defendant misunderstood the seriousness of the situation and was honestly attempting to help a business customer (*United States* v. *Sherman*, 40 F Supp. 478, 479 (E.D.N.Y.)).

Here, every reasonable inference from the record supports the view that petitioner's only occupation at the time of naturalization was bootlegging and that his three-time answer that his occupation was real estate was consciously and knowingly false.

C. *Petitioner's concealment of his true occupation misrepresented a material fact.*

The Nationality Act of 1906, Section 4, paragraph 4, 34 Stat. 596, 598, under which petitioner was natu-

ralized, provided that no alien should be admitted to citizenship unless "he has behaved as a man of good moral character" for at least five years immediately preceding the date of his petition for naturalization. Thus, the applicant's character, not only at the time of his naturalization proceeding in 1925 but in prior years as well, was, in part, the test of his fitness for citizenship. This in turn required consideration of the applicant's present and past behavior as one evidentiary criterion for assessing his character. It follows that proof as to his behavior would be pertinent—regardless of whether revelation of the true facts would have itself established a disqualification for citizenship, and regardless of whether the applicant might have effectively met the negative inference as to character which such revelation might imply. Rational appraisal of a man's present and past moral character demands full disclosure, not merely disclosure of those aspects of the applicant's conduct which are favorable or neutral. When the applicant falsifies as to his present and past behavior he forecloses intelligent inquiry as to whether that behavior is consistent or inconsistent with good moral character, an evaluation which is for the naturalization court, not the applicant. The test of materiality is, in short, whether the question seeks information of past or present behavior pertinent to one of the prerequisites of citizenship designated in the statute—in this case, good moral character at the time of, and for five years preceding, naturalization.

The fact, for example, that a person has been arrested and charged with crime in the past, though not necessarily a disqualification for citizenship, is material to the question of his past behavior as a person of good moral character. A false answer to this question (cutting off further investigation) has been held to constitute a material falsification even though a truthful answer might not have furnished a complete basis for a denial of naturalization. *United States* v. *Montalbano, supra,* 236 F. 2d 757, 759–760 (C.A. 3), certiorari denied *sub nom. Genovese* v. *United States,* 352 U.S. 952; *Corrado* v. *United States,* 227 F. 2d 780, 782–784 (C.A. 6), certiorari denied, 351 U.S. 925; *United States* v. *Ascher,* 147 F. 2d 544 (C.A. 2), certiorari denied, 325 U.S. 884; *United States* v. *De Francis,* 50 F. 2d 497 (C.A. D.C.); *United States* v. *Saracino,* 43 F. 2d 76 (C.A. 3); *United States* v. *Accardo,* 113 F. Supp. 783 (D. N.J.), affirmed, 208 F. 2d 632 (C.A. 3), certiorari denied, 347 U.S. 952. False answers to questions concerning identity (*United States* v. *De Lucia,* 163 F. Supp. 36, 40–41 (N.D. Ill.), affirmed, 256 F. 2d 487 (C.A. 7), certiorari denied, 358 U.S. 836), marriage (*United States* v. *Lumantes,* 139 F. Supp. 574 (N.D. Cal.), affirmed 232 F. 2d 216 (C.A. 9)), residence (*United States* v. *Udani,* 141 F. Supp. 30 (S.D. Cal.)), and events which occurred outside the statutory period (*Stevens* v. *United States,* 190 F. 2d 880, 881 (C.A. 7)) have similarly been held to constitute material falsifications. The proper standard is whether the falsification had the effect of precluding the government from pursuing an avenue of investigation which might

have resulted in the applicant's failure to obtain citizenship.[10] See also the discussion in the government's brief in *Chaunt* v. *United States*, No. 22, this Term at pp. 28 *et seq.*

The same rationale was applied by the very district judge (Thacher, D. J.) who admitted petitioner to citizenship (R. 205; Govt. Ex. 9) in a denaturalization case decided the year following petitioner's naturalization. In *United States* v. *Mirsky*, 17 F. 2d 275 (S.D.N.Y.), the defendant had been convicted of violating the National Prohibition Act and the Eighteenth Amendment during the statutory period of five years preceding his naturalization. The judge cancelled the certificate of naturalization, concluding

[10] The same standard has been applied in determining the materiality of false statements made in visa applications and other documents used by aliens to procure admission into the country, that is, the tendency of the misrepresentation to forestall inquiry as to the applicant's eligibility to enter: *Duran-Garcia* v. *Neelly*, 246 F. 2d 287, 291 (C.A. 5); *Ablett* v. *Brownell*, 240 F. 2d 625, 630 (C.A. D.C.); *Landon* v. *Clarke*, 239 F. 2d 631, 634–636 (C.A. 1); *United States* v. *Flores-Rodriguez*, 237 F. 2d 405, 411–412 (C.A. 2); *United States ex rel. Volpe* v. *Smith*, 62 F. 2d 808, 812 (C.A. 7), affirmed on other grounds, 289 U.S. 422.

Like criteria for materiality has been applied in perjury cases (*United States* v. *Moran*, 194 F. 2d 623, 626 (C.A. 2); *Woolley* v. *United States*, 97 F. 2d 258, 262 (C.A. 9), certiorari denied, 305 U.S. 614; *Carroll* v. *United States*, 16 F. 2d 951, 953 (C.A. 2), certiorari denied, 273 U.S. 763; *United States* v. *Parker*, 244 F. 2d 943, 950–951 (C.A. 7), certiorari denied, 355 U.S. 836) and prosecutions for false statements under 18 U.S.C. 1001 (*Weinstock* v. *United States*, 231 F. 2d 699, 701–702 (C.A. D.C.); see *Freidus* v. *United States*, 223 F. 2d 598, 601–602 (C.A. D.C.)).

that "One who deliberately violates the Eighteenth Amendment of the Constitution cannot be said to be attached to the principle declared by that amendment." It is not important that the district judge put his decision on the ground that a statutory prerequisite to naturalization other than good moral character—lack of attachment to the principles of the Constitution—did not exist. Both requirements are (8 U.S.C. 1427(a)), and were, at the time of petitioner's naturalization (Act of June 29, 1906, ch. 3592, § 4, 34 Stat. 598), statutory prerequisites for naturalization. A false answer precluding further inquiry as to the existence of either requirement would, therefore, be a material falsification. False answers as to convictions for violating or violations of the Eighteenth Amendment and the National Prohibition Act have been treated by the courts as material to either or both requirements. See *United States* v. *De Francis, supra,* 50 F. 2d 497, 498 (C.A. D.C.); and *Turlej* v. *United States,* 31 F. 2d 696, 698–699 (C.A. 8).

The materiality of petitioner's false statement is clearly shown when it is considered in the light of the fact that he engaged in flouting the Eighteenth Amendment and its implementing laws as a means of livelihood over a period of years. The evidence does not show isolated instances of the violation of a national policy regarded as unwise by many. Rather it shows massive involvement for massive profits, on a large business scale. The purchase of a bottle of "bathtub gin" is one thing; the commercialization of an unlawful course of conduct is quite another. It

cannot be denied that the disclosure of petitioner's true occupation would very likely have led the District Court to refuse naturalization. *United States* v. *Mirsky, supra.* The false statement as to occupation was therefore highly material.

II

THE LAPSE OF TIME SINCE NATURALIZATION DID NOT BAR THE GOVERNMENT FROM INSTITUTING DENATURALIZATION PROCEEDINGS AGAINST PETITIONER

Having procured his naturalization through a fraudulent misrepresentation, petitioner seeks to retain the privilege of citizenship by contending that the government ought not to be permitted to maintain this action. In effect, he asks this Court to forge a special rule of laches applicable to denaturalization proceedings. However, Congress affirmatively chose not to limit the time within which a suit may be brought to cancel a certificate of citizenship, and laches has never been considered applicable to actions by the United States. Moreover, petitioner would not be in a position to invoke the doctrine of laches even if it were generally available.

A. Congress has not provided a limitation period applicable to denaturalization proceedings.

Subsection (i) of Section 340 of the Immigration and Nationality Act of 1952 (8 U.S.C. 1451(i)) provides that the authority to cancel certificates of naturalization procured by wilful misrepresentation "shall apply not only to any naturalization granted and to certificates of naturalization and citizenship issued under the provisions of this subchapter, but to

any naturalization heretofore granted by any court, * * *," *supra*, pp. 3–4 (emphasis added). In terms, then, Congress has affirmatively decided that denaturalization proceedings are not to be barred by the lapse of any stated period of time, and that the revocation authorization in the 1952 Act should have retroactive application. This legislative choice was a deliberate one, not at all assignable to inadvertence, since, as we discuss below, the language used by Congress is traceable to earlier statutes, and Congress well knew how to set forth a limitation, had it chosen to do so.[11]

Subsection (i) of Section 340, *supra*, did not represent an innovation in the law. Section 338 of the Nationality Act of 1940 (54 Stat. 1158, 8 U.S.C. (1940 ed.) 738) also provided a means for cancelling certificates of citizenship on proper grounds, and subsection (g) used the same language now found in subsection (i):

> The provisions of this section shall apply not only to any naturalization granted and to certificates of naturalization and citizenship issued under the provisions of this Act, but to any naturalization heretofore granted by any court, * * *.

[11] For example, in 8 U.S.C. 1251, which deals with the deportation of aliens, subsection (a)(4) provides that an alien convicted of a crime involving moral turpitude is deportable, but limits the time period within which the conviction must occur to "within five years after entry." The absence of a similar limitation in 8 U.S.C. 1451 (Section 340 of the 1952 Act) is strong evidence that Congress did not intend to limit the time within which denaturalization proceedings must be instituted. Cf. *Benanti* v. *United States*, 355 U.S. 96, 105.

Both subsections really owe their origin to Section 15 of the Act of June 29, 1906, 34 Stat. 596, 601, which first expressly authorized denaturalization proceedings, on the grounds of fraud or illegal procurement, and added:

> The provisions of this section shall apply not only to certificates of citizenship issued under the provisions of this Act, but to all certificates of citizenship which may have been issued heretofore by any court exercising jurisdiction in naturalization proceedings under prior laws.[12]

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[12] In 1905, President Theodore Roosevelt appointed a Commission on Naturalization, which made an extremely detailed and thorough report of the nation's immigration and naturalization policies, including a summary of the extensive frauds practiced in naturalization proceedings prior to that time. The report, which included the draft of a proposed law, was printed as a House Document. Section 34 of that draft dealt with revocation of citizenship, and included retroactive application without time limitation. House Doc. No. 46, 59th Cong., 1st Sess., App. F, p. 106. The draft bill was introduced in the House of Representatives and considered by the Committee on Immigration and Naturalization. The bill reported by the Committee (H.R. 15442, 59th Cong., 1st Sess.) included, in Section 17, the proposed revocation procedure. See House Report No. 1789, 59th Cong., 1st Sess., pp. 3, 7. After amendment of the bill during floor debate, Section 17 emerged as Section 15, as passed by the House. 40 Cong. Rec. 7871, 7876. The Senate did not change Section 15. 40 Cong. Rec. 9359–9361. After a conference on other amendments, the bill, including Section 15, was passed by Congress and signed by the President. 40 Cong. Rec. 9680, 9777, 9804, 9807. The entire substance of Section 340 of the present Act is taken from Section 15 of the 1906 Act. See *Bindczyk* v. *Finucane*, 342 U.S. 76, 79; *United States* v. *Zucca*, 351 U.S. 91, 94.

A case testing the provisions of Section 15 of the 1906 Act, *supra*, came before this Court not long thereafter. In *Johannessen* v. *United States*, 225 U.S. 227, petitioner procured his naturalization in 1892, through perjured testimony. Sixteen years later, in 1908, the government learned of the way in which petitioner obtained his citizenship, instituted proceedings to cancel his certificate, and obtained a decree in its favor. When the case reached this Court, petitioner contended, *inter alia*, that the provisions of Section 15 were not retrospective. As this Court viewed it, however, "This is refuted by a reading of the closing paragraph of the section." 225 U.S. at 242. Finally, Johannessen argued that, if retrospective in form, the Section was void as an *ex post facto* law. The Court rejected the contention, noting that Article I, Section 9 of the Constitution, prohibiting *ex post facto* legislation, is confined to laws respecting criminal punishments, and that Section 15 "imposes no punishment upon an alien who has previously procured a certificate of citizenship by fraud or other illegal conduct. It simply deprives him of his ill-gotten privileges" (*Ibid.*)

In a later case, *Luria* v. *United States*, 231 U.S. 9, 21–22, the Court again accorded its natural meaning to the terms used by Congress in the final paragraph of Section 15, saying:

> * * * it would seem that the last paragraph [of § 15], in view of its plain and unambiguous language, must be accepted as extending the preceding paragraphs to all certificates, whether

issued theretofore under prior laws or thereafter under that [1906] act.[13]

This Court has also given literal effect to language used by Congress in the present Immigration and Nationality Act.[14] The literal language of Section 340 (i), 8 U.S.C. 1451(i) (*supra*, pp. 3–4), places no time limitation upon the institution of denaturalization proceedings, and as we have shown, the history of the provision fully supports the literal reading.

B. *On general principles, this suit should not be barred by laches.*

Petitioner argues that, although Congress has refrained from placing any time limitations on proceedings for denaturalization, the courts should in effect impose their own limitation by applying the doctrine of laches to denaturalization procedure. However, not only is the doctrine of laches not applicable to the United States generally, but it would be particularly inappropriate if applied in denaturalization proceedings founded on fraud. And even if the doctrine were applicable in some situations there is no occasion for its application in this case.

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[13] See also *Sourino* v. *United States*, 86 F. 2d 309, 310 (C.A. 5), certiorari denied, 300 U.S. 661, where the defendant fraudulently misrepresented that he was single, although he was actually married. An indictment charging the making of a false affidavit, the giving of false testimony, and the fraudulent procurement of naturalization was barred by the statute of limitations. The denaturalization proceeding, however, was not similarly barred.

[14] See *United States* v. *Zucca*, 351 U.S. 91, 95, where the Court relied on the "natural meaning" of the language in Section 340(a) as requiring the conclusion that an affidavit of good cause must be filed with the complaint.

1. *The doctrine of laches does not apply to the United States.*

Ever since *United States* v. *Kirkpatrick*, 22 U.S. (9 Wheat.) 720, 735–737, this Court has consistently held that laches is not imputable to the government in enforcing its rights. *United States* v. *Summerlin*, 310 U.S. 414, 416; *Board of Commissioners* v. *United States*, 308 U.S. 343, 351; *Guaranty Trust Company* v. *United States*, 304 U.S. 126, 132; *Stanley* v. *Schwalby*, 147 U.S. 508, 514, 515; *United States* v. *Nashville, C. & St. L. Ry. Co.*, 118 U.S. 120, 125, 126; *Fink* v. *O'Neil*, 106 U.S. 272, 281; *United States* v. *Thompson*, 98 U.S. 486, 489. In *Kirkpatrick*, an action to recover on a surety bond, it was enough for the purposes of that case to put the rule on the basis that laches, unaccompanied by fraud, would not serve to discharge a surety obligation between private individuals, and that no more rigid rule should be applied to the government. In 1840, however, the Court expressly recognized, in *United States* v. *Knight*, 39 U.S. (14 Pet.) 301, 315, that although sovereign immunity from the defense of laches or limitations had an historic root in the English common law maxim, *quod nullum tempus occurrit regi* (no lapse of time bars the king), its continued vitality was attributable to "a great principle of public policy, which belongs alike to all governments, that the public interest should not be prejudiced by the negligence of public officers, to whose care they are confided."[15]. Thus,

[15] See also the language of Story, J., sitting as a circuit justice in *United States* v. *Hoar*, 26 Fed. Cas. 329, 330, No. 15,373 (C.C.D. Mass.), a case decided in 1821. Mr. Justice Story was still a member of this Court in 1840.

"the United States, asserting rights vested in them as a sovereign government, are not bound by any statute of limitations, unless Congress has clearly manifested its intention that they should be so bound." *United States* v. *Nashville, C. & St. L. Ry Co., supra.* Down through the years the doctrine became sufficiently accepted, and was applied in enough varied situations, to permit this Court to say, in *Board of Commissioners* v. *United States, supra,* that "Unless expressly waived, it is implied in all federal enactments."[16] See, generally, as to sovereign rights and remedies, *United States* v. *United Mine Workers of America,* 330 U.S. 258, 272–273; *United States* v. *Wittek,* 337 U.S. 346, 359; *Leiter Minerals, Inc.* v. *United States et al.,* 352 U.S. 220, 224–226; compare *United States* v. *Lindsay,* 346 U.S. 568, 570.

2. *It would be inappropriate to apply the doctrine of laches to denaturalization for fraud.*

(*a*) The refusal to apply the doctrine of laches, an equitable doctrine, to the United States is particularly wise where, as here, an action is founded in fraud. "[L]aches is not like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the property or the parties." *Galliher* v.

[16] Although this statement was made in the context of state limitations and state doctrines of laches, the cases cited *supra*, p. 50, make it clear that the language in *Board of Commissioners* is not attributable to considerations of federal supremacy. It remains true, as the cases hold, that the government's cause of action is subject to a time limit only if Congress has expressly made it so subject.

Cadwell, 145 U.S. 368, 373, see *Southern Pacific Co.* v. *Bogert*, 250 U.S. 483, 488–489; *Gardner* v. *Panama Railroad Co.*, 342 U.S. 29, 31; *Czaplicki* v. *The Hoegh Silvercloud et al.*, 351 U.S. 525, 533. Equity will not lend itself to aid fraud and historically has relieved from it. Thus, as between private litigants, "want of due diligence by the plaintiff may make it unfair to pursue the defendant, [but] fraudulent conduct on the part of the defendant may have prevented the plaintiff from being diligent and may make it unfair to bar appeal to equity because of mere lapse of time." *Holmberg* v. *Armbrecht*, 327 U.S. 392, 396. And so a defendant may not be entitled to assert a defense of laches to an action based on fraud, "though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party" (*id.* at p. 397). Although, in many instances, it is desirable that there be an end to litigation, the courts have always been willing to go very far "to set aside fraudulently begotten judgments." *Hazel-Atlas Glass Company* v. *Hartford-Empire Company*, 322 U.S. 238, 245; *Shawkee Manufacturing Company, et al.* v. *Hartford-Empire Company*, 322 U.S. 271. When that fraud is worked upon the court itself—as here, where petitioner obtained the benefits of citizenship by making a material misrepresentation to the court—"[i]t is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process

must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud" (*Hazel-Atlas Glass Co., supra,* 322 U.S. at 246)."

(*b*) Those principles are applicable to denaturalization proceedings. See *Knauer* v. *United States,* 328 U.S. 654, 671–674. There is a limit to the misrepresentations that may be made with impunity by one who seeks citizenship. Congress has decided that that limit takes the form of denaturalization proceedings not bound by time limitations, and this Court ought not to depart from established principles to add such a limitation.

152,457 aliens were naturalized in the fiscal year ending June 30, 1925, the year during which petitioner filed his petition for naturalization.[18] "The personnel of the Bureau [of Naturalization] on July

[17] In *Hazel-Atlas Glass Company,* a spurious article in a trade publication was used to advance a patent application and, several years later, to influence the decision by the Court of Appeals for the Third Circuit in a patent infringement suit. This Court, in *Johannessen* v. *United States,* 225 U.S. 227, 238–239, saw a similarity between an application for citizenship and an application for a patent.

[18] The Annual Report of the Commissioner of Immigration and Naturalization for the Year Ending June 30, 1959, Table 37, p. 76, lists the number of final naturalizations for each year since 1908. The figures for representative years during the period at issue here were as follows:

1939—188,813
1943—318,933

Although the report for the year ending June 30, 1960, has not yet been published, we have been advised that 119,442 aliens were naturalized in the most recent fiscal year.

30, 1925, was 75, and the entire field personnel did not exceed 225 examiners and clerks." Annual Report of the Commissioner of Naturalization for the Year Ending June 30, 1925, Department of Labor, p. 2. It is apparent, therefore, that the examiners were obliged to rely upon the truthfulness of the statements made by the applicants for citizenship, and that the district courts were in no better position to investigate the representations made by those applicants. It is also inevitable that in so extensive a process some frauds will occur which may not come to light until years later. And the greater the fraud, the greater is the probability that it will not come to light immediately. There is no reason why a successful fraud should have immunity from challenge indefinitely.

Moreover, in view of the large numbers involved, it is not reasonable to hold the United States as an entity responsible for immediately correlating every piece of information that may come into the hands of any one of its many agencies. For example, in this case petitioner points to the fact that in 1925 he was indicted for conspiracy to violate the Prohibition Act as showing that the United States had knowledge, close to the time of naturalization, that petitioner was a bootlegger (Pet. Br. 34). But the agency having primary responsibility in naturalization matters, the Immigration and Naturalization Service, can in no realistic sense be charged with knowledge of every prohibition charge made in the country or even in the Southern District of New York, particularly so where, as in petitioner's case, the charge did not result in conviction. And, on the other hand, a United

States Attorney investigating criminal offenses would hardly be in a position to check each particular averment made in a petition for naturalization by a person who happened to be a defendant on a charge of liquor violations. It was undoubtedly the extensive character of naturalization proceedings and the known possibility that frauds would not be uncovered for years that led Congress not to fix a time limitation on denaturalization. The House Report on the 1906 Act (H. Rep. No. 1789, 59th Cong., 1st Sess., p. 2) stated:

> With the great influx of foreigners who have in recent years come to our shores and who are yearly coming in increasing numbers, and who seek naturalization under our laws, a very loose, unsatisfactory, and careless method of naturalization has grown up, leading to the grossest character of frauds against American citizenship. The conditions that have been revealed by special investigations of the frauds committed against the naturalization laws render wholly unnecessary any argument upon the necessity at this time of fully exercising all the authority in naturalization matters conferred by the Constitution upon Congress.

The courts should not adopt a policy of limitations which Congress has deliberately rejected. Mere delay in bringing the action ought not bar the United States from bringing a denaturalization action for fraud.

The defendant is protected against the dangers that may result from delay by the heavy burden of proof which the government must sustain in making out its case for denaturalization. Its case must be

"clear, unequivocal, and convincing" (see cases cited *supra*, p. 36, fn. 8). That burden of proof provides a sufficient safeguard against denaturalization judgments founded on the time-dimmed recollection of uncorroborated witnesses. The aim of the proceeding is to deprive the defendant of privileges obtained by fraud. So long as the government can show by proof which does not leave the issue in doubt that the privileges were in fact ill-gotten, it ought to be permitted to do so. As this Court said in *Johannessen* v. *United States*, *supra*, 225 U.S. 227, 241–242:

> An alien has no moral nor constitutional right to retain the privileges of citizenship if, by false evidence or the like, an imposition has been practiced upon the court, without which the certificate of citizenship could not and would not have been issued. * * *
>
> * * * [I]f, after fair hearing, it is judicially determined that by wrongful conduct he has obtained a title to citizenship, the act provides that he shall be deprived of a privilege that was never rightfully his. * * *[19]

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[19] See also, *Knauer* v. *United States*, 328 U.S. 654, 673–674; *Luria* v. *United States*, 231 U.S. 9, 23–24; *United States* v. *Ness*, 245 U.S. 319, 327.

This Court's line-of-decisions requiring strict compliance with the conditions Congress has imposed as prerequisites for an award of citizenship do not suggest that the potential hardships of denaturalization should be tempered by importation into this field of alleviating doctrines. See, *e.g.*, *United States* v. *Ness*, 245 U.S. 319 (cancellation of naturalization for failure to file a certificate of arrival); *Johannessen* v. *United States*, 225 U.S. 227 (non-compliance with the residence requirement); *United States* v. *Ginsberg*, 243 U.S. 472 (denaturalization because the naturalization hearing was not held in open court); *Maney* v.

3. *The lower courts have not applied any time limitations to denaturalization actions.*

Applying the doctrine that the government is not barred in asserting its remedies by the lapse of time, and noting that Congress has not chosen to limit the time within which the action must be instituted, the lower courts have consistently held that the government may begin proceedings to cancel a certificate of naturalization at any time. *United States* v. *Spohrer*, 175 Fed. 440, 448 (C.C.D.N.J.); *United States* v. *Ali*, 7 F. 2d 728, 730 (E.D. Mich.); *United States* v. *Parisi*, 24 F. Supp. 414 (D. Md.); *United States* v. *Marino*, 27 F. Supp. 155, 156 (S.D.N.Y.); *United States* v. *Brass*, 37 F. Supp. 698, 699–700 (E.D. N.Y.); *United States* v. *Kusche*, 56 F. Supp. 201, 206 (S.D. Cal.); see Cable, *Loss of Citizenship, Denaturalization, The Alien in Wartime* (1943), p. 60: "The test is not the length of time between naturalization and filing proceeding to cancel; the test is whether the certificate in its inception was procured fraudulently or illegally. If so, action to cancel may be filed at any time after naturalization." There have been other lower court cases where the lapse of time between naturalization and the filing of the complaint for denaturalization was comparable to the time-lag in this case. See *Stacher* v. *United States*, 258 F. 2d 112 (C.A. 9); certiorari denied, 358 U.S. 907 (1930 to

United States, 278 U.S. 17; *Lurid* v. *United States*, 231 U.S. 9; *Tutun* v. *United States*, 270 U.S. 568, 578; *Schwinn* v. *United States*, 311 U.S. 616. In these cases the Court has held the defendant in denaturalization proceedings to strict standards, despite possible hardship.

1953); *United States* v. *De Lucia*, 256 F. 2d 487 (C.A. 7), certiorari denied, 358 U.S. 836 (1928 to 1956); *Brenci* v. *United States*, 175 F. 2d 90 (C.A. 1) (1922 to 1946); *United States* v. *Ascher*, 147 F. 2d 544 (C.A. 2), certiorari denied, 325 U.S. 884 (1920 to 1943); *United States* v. *Failla*, 164 F. Supp. 307 (D.N.J.) (1933 to 1953); *United States* v. *Galato*, 171 F. Supp. 169 (M.D. Pa.) (1934 to 1954).[20]

4. *Petitioner has shown no basis for the application of laches in his case even if that doctrine were otherwise applicable.*

Assuming, *arguendo*, that the doctrine of laches might be applicable in some denaturalization cases, there would be no reason to apply it here.

Mere lapse of time is never sufficient to establish laches; there must be a showing of prejudice as a result of the delay. *Galliher* v. *Cadwell*, 145 U.S. 368, 373; *Southern Pacific Company* v. *Bogert*, 250 U.S. 483, 488–489; *Holmberg* v. *Armbrecht*, 327 U.S. 392,

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[20] Under English law, "the Secretary of State may by order deprive any such [naturalized] citizen [of the United Kingdom and Colonies] of his citizenship if he is satisfied that the registration or certificate of naturalisation was obtained by means of fraud, false representation or the concealment of any material fact." British Nationality Act of 1948, Section 20(2), 11 and 12 Geo. 6, c. 56, 28 Halsbury's Statutes of England (2d ed.) 151. No express time limit is put on the invocation of this administrative procedure, and a recent writer on the subject seems to be of the opinion that action may be taken whenever the fraud, etc., is discovered. Parry, *Nationality and Citizenship Laws of The Commonwealth and of The Republic of Ireland* (1957), p. 330, Illustration 12, see generally, pp. 321–330. The Limitations Act of 1939, 2 and 3 Geo. 6, c. 21, as amended, is not applicable, nor is the English doctrine of laches. Franks, *Limitation of Actions* (1959), pp. 235–244.

396; *Gardner* v. *Panama Railroad Company*, 342 U.S. 29, 31; *Czaplicki* v. *The Hoegh Silvercloud et al.*, 351 U.S. 525, 533; Restatement, *Restitution*, Sec. 148.

Petitioner had the benefits of citizenship as the result of the delay, but can show no prejudice from that delay. He points to the fact (Brief, pp. 34–35) that, between the time of naturalization and the institution of denaturalization proceedings, the naturalization examiners who processed his application, the witnesses who testified on his behalf, and the judge who admitted him to citizenship have all died. But none of these deaths affects the proof in his case. There is no dispute as to the question which petitioner was asked, *i.e.*, what his occupation was. Petitioner would not seriously contend that the naturalization examiner would have been in a position to testify that petitioner was told that this question meant any legal occupation to the exclusion of his actual occupation. If petitioner understood that question to mean anything other than the primary means by which he made his livelihood, only he could furnish that proof. As to the proof of the falsity of petitioner's answer, the death of the witnesses named has no bearing. The primary proof that petitioner's statements were not only false, but wilfully false, flows from his own admissions made subsequent to his naturalization. The District Court saw the case in this posture, saying (R. 26):

> * * * [I]n view of the fact that the defendant has frankly admitted, on a number of occasions, that in the period around 1925 and prior thereto, he was engaged in bootlegging,

> the testimony of the individual witnesses [as to his activities] is, if anything, merely cumulative.

In this context, then, the lapse of time between admittance to citizenship and this denaturalization proceeding worked for petitioner and not against him, since he retained and enjoyed an ill-gotten benefit for a longer, rather than a shorter, period of time.[21]

III

PETITIONER'S ADMISSIONS AS TO HIS TRUE OCCUPATION AT THE TIME OF NATURALIZATION WERE NOT TAINTED BY WIRETAPPING

Petitioner's contention that some of his sworn admissions as to his occupation were tainted by wiretapping is not well-founded, for the evidence shows that there was no causal relationship between the wiretapping and the evidence relied on here. The record shows, as set forth *supra*, p. 10, fn. 3, that, pursuant to an order of a New York court, petitioner's telephone calls were intercepted during the period from May to November, 1943. While monitoring these messages, the local investigators heard a conversation between petitioner and a nominee for state judicial office. Although the local authorities had planned to interrogate petitioner before a grand jury in any event, knowledge that this conversation had taken place led to an immediate grand jury investigation

[21] In addition, we point out *supra*, pp. 54–55, that petitioner's 1925 indictment for a prohibition violation—on which he relies for the claim that the government long ago knew sufficient facts to institute denaturalization proceedings against him—cannot be used to sustain a charge of laches.

of the judicial nomination, with the result that petitioner was called before the grand jury at an earlier date than would otherwise have been the case. While before the grand jury, petitioner was questioned as to his activities before 1930 for the purpose of showing his background, and in this connection he stated that he had been in the bootlegging business during the 1920's. District Attorney Frank Hogan, the interrogator, had not learned anything about petitioner's activities before 1930 through wiretapping, and did not give petitioner cause to believe that Hogan had learned of these activities through wiretapping. He did know petitioner's background, but he had gained that knowledge from newspaper reports, court records, and local police records.

Everything said with respect to the grand jury investigation applies as well to petitioner's interrogation before the referee appointed by the Appellate Division. Mr. Hogan had not learned of petitioner's background through wiretapping, and none of the intercepted messages related to that pre-1930 background.[22] The claim that petitioner's admissions re-

[22] Petitioner (Brief, pp. 39–41) makes much of the fact that the first denaturalization proceeding against him was dismissed by the District Court on the ground that the government's case was tainted by wiretapping, a ground rejected by the Court of Appeals. But this second denaturalization suit was tried in the light of *Benanti* v. *United States*, 355 U.S. 96, and the evidence is much different, cf. the statement of facts in the government's brief in opposition in *Costello* v. *United States*, No. 494, O.T. 1957.

It is true that petitioner, while before the New York grand jury in 1943, was questioned in regard to the subject of that grand jury investigation on the basis of some of the inter-

garding the illegal alcohol traffic were tainted therefore comes down to these propositions: (1) but for the wiretapping he would have been called before a grand jury at a time later than the time when he actually appeared, and in connection with another matter, and (2) this is enough to establish a causal relationship between the wiretapping and petitioner's admissions as to his past occupation.

On this basis, petitioner sought to invoke the concept of the "fruits of the poisonous tree", developed in *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, and, with reference to wiretapping, in *Nardone* v. *United States*, 308 U.S. 338. The District Court could not accept petitioner's argument as sound, pointing out that to do so "would mean that a man whose telephone had been tapped would be granted immunity for any admissions which he thereafter made, not in the telephone conversations but in answer to any [collateral] questions in a later investigation. There is no basis for extending the rule [of the second *Nardone* case, 308 U.S. 338] to this degree" (R. 41–42).

In *Nardone* v. *United States*, 308 U.S. 338, this Court ruled that the prohibition of Section 605 of the Communications Act (47 U.S.C. 605) is not limited to the disclosure at trial of the contents of an intercepted communication, but extends to the divulgence of evidence obtained through derivative uses of

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cepted conversations (Pet. Brief, pp. 41–43). But the admissions involved in the present case were only in the preliminary matters discussed above.

the wiretap. The Court relied upon the postulate that a broad meaning should be given the statutory terms in order to effectuate the policy formulated by Congress. 308 U.S. at 340. At the same time, however, the Court put a rein upon this method of excluding logically relevant evidence, requiring that exclusion depend upon the existence of a direct casual connection between illicit interception and offered evidence. "Sophisticated argument may prove a causal connection between information obtained through illicit wiretapping and the Government's proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint". 308 U.S. at 341.[23]

The situation in this case is different from that in *Nardone*—the nexus between the wiretapping by the local officers and petitioner's admissions as to his occupation is too insubstantial to justify exclusion of those admissions. True enough, petitioner perhaps might not have been brought before the grand jury and put under oath at the time that that was actually done had there been no wiretapping. But a grand jury investigation was contemplated and he would have been questioned in any event. Moreover, his admissions as to occupation were elicited during general ques-

[23] Nothing said in *Goldstein* v. *United States*, 316 U.S. 114, is pertinent to this point, since there it was assumed that a causal connection existed between the wiretapping and the testimony offered at trial (*id.* at 117). The Court went on to hold that the defendants lacked standing to challenge the offered evidence, since they were not parties to the intercepted communications (*id.* at 122).

tioning as to his background, that questioning was collateral to the grand jury inquiry, and the questioner's knowledge of that background came from an untainted source. And, in actual fact, there is no room at all for the argument that petitioner might not have admitted his past unlawful occupation if questioned at a later time, since he disclosed that information during the course of other proceedings, held both before and after 1943—proceedings where there was no suggestion of wiretapping.

In terms of causation, the present situation is analogous to *United States* v. *Bayer*, 331 U.S. 532, and *Lyons* v. *Oklahoma*, 322 U.S. 596, where the Court held that the fact that a first confession was inadmissible because of coercion (or lack of voluntariness) would not render inadmissible a second confession voluntarily made—rather than to *Nardone, supra; Silverthorne, supra;* and *Weiss* v. *United States*, 308 U.S. 321. In *Bayer*, the Court noted (331 U.S. at 540–541) that a later confession always may be looked upon as the fruit of an earlier inadmissible confession, since the defendant suffers certain psychological and practical disadvantages as the result of confessing. In a sense, then, the earlier statement is invariably at least one of the complex of factors leading to a second act of incrimination. But under *Bayer* the second statement is not deemed the poisoned fruit of the first so long as the first inadmissible statement is not the primary causative factor.

In *United States* v. *Remington*, 208 F. 2d 567, 569–570 (C.A. 2), certiorari denied, 347 U.S. 913, the de-

fendant was convicted of perjury committed during the course of his trial on a perjury indictment founded on false statements made before a grand jury. On appeal, he contended that the government had procured his indictment for perjury before the grand jury through illegal conduct, and invoked the doctrine of *Nardone* v. *United States, supra,* and *Silverthorne Lumber Co.* v. *United States, supra,* that "knowledge gained by the Government's own wrong cannot be used by it * * *", *id,* 251 U.S. at 392. He contended that he never would have been in court but for the illegally procured indictment, and thus would not have given the false testimony of which he was convicted. The Court of Appeals assumed "that the first indictment is bad because of misconduct in the grand jury proceedings" (208 F. 2d at 569), but held that there was no, or at least an insufficient, causal connection "between the government's wrong and the defendant's act of perjury during the trial" (208 F. 2d at 570).

In *Bayer, Lyons,* and *Remington,* there were volitional acts by the defendant which cut across the causal tie. Here, there never was a direct causal relationship. Petitioner's telephone calls were not intercepted for the purpose of learning about his source of livelihood before 1930, nor was he called before the grand jury for the purpose of uncovering that past illegality. His admissions as to his occupation during the prohibition era were thus neither derived from, nor induced by, the interception. Such connection as existed had become too attenuated to call for application of the *Nardone* rule.

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IV

PETITIONER SHOULD NOT BE PERMITTED TO AMEND HIS PETITION FOR A WRIT OF CERTIORARI SO AS TO RAISE BELATEDLY THE ISSUE OF *RES JUDICATA* WHICH HE CONTESTED BEFORE BOTH LOWER COURTS BUT CHOSE NOT TO SET FORTH IN HIS ORIGINAL PETITION

On April 15, 1960, petitioner filed a motion for leave to amend the petition for a writ of certiorari which he had filed on March 18, 1960, so as to include a question of *res judicata* not raised in the petition as originally filed. On May 16, 1960, this Court granted the petition and assigned the motion for leave to amend for argument together with *United States* v. *Lucchese*, No. 57, this Term, in which certiorari was granted. We discuss in this Point the fact that petitioner has not shown any valid reason for raising the issue so belatedly—two days before the government's response to the petition for certiorari was due. Under Point V, *infra*, pp. 71–80, we point out that the question sought to be raised was correctly decided by the court below.

The issue raised in petitioner's motion to amend stems from the history of the prior denaturalization suit against petitioner. In that prior action, an affidavit of good cause was not filed simultaneously with the complaint. The District Court, for reasons not pertinent here, dismissed the cause without prejudice to the government's right to institute a new proceeding on the same ground. 145 F. Supp. 892, 897. This judgment was reversed by the Court of Appeals. 247 F. 2d 384. When the Court of Appeals' judgment

was reviewed here on certiorari, this Court reversed for a reason not considered by the Court of Appeals, *i.e.*, that the affidavit of good cause had not been filed with the complaint. 356 U.S. 256. The Court remanded the cause to the District Court with directions "to dismiss the complaint". 356 U.S. 256.

After remand, the government presented to the District Court a proposed order for dismissal "without prejudice." The District Court, however, felt constrained by the mandate of this Court merely to enter an order of dismissal which did not specify whether it was with or without prejudice. The government did not appeal from this order (R. 253).

After the present, separate, denaturalization action had been instituted in the District Court, petitioner moved to dismiss the complaint on the ground that the dismissal of the prior proceeding barred the instant action on principles of *res judicata*. He argued that, under Rule 41(b) of the Rules of Civil Procedure,[24] the order of dismissal, since it did not specify that it was "without prejudice," operated as an adjudication on the merits, and that the government, if it had wished to avoid such effect, should have appealed from the District Court's order on remand. This contention was overruled by the District Court on February 20, 1959, on the ground that the dismissal of the prior action was for lack of jurisdiction in the sense that

[24] Rule 41(b), *supra*, pp. 4–5, provides: "* * * Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits."

that term is used in Rule 41(b) (R. 34–35; 171 F. Supp. 10, 22).

On appeal, petitioner renewed his contention that the dismissal of the prior action operated as a dismissal with prejudice and therefore barred the present suit. Without deciding what is or is not a dismissal for lack of jurisdiction within the purview of Rule 41(b), the Court of Appeals ruled that the dismissal of the prior proceeding, pursuant to the mandate of this Court, did not operate to bar the present action. It stated (R. 254–255):

> It seems to us that Rule 41(b) should be interpreted as applying only to cases in which the trial judge is exercising some discretion and is not merely acting mechanically pursuant to the direction of a superior court. There must be a rule that a bare "dismissal" is to be interpreted as either with or without prejudice, and 41(b) provides this rule in all cases where the district court has a real discretion in the matter. But there is obviously no such need where the trial court's disposition of the case has been predetermined by a superior court. It would be a violation of the intention of all the courts concerned if the dismissal of the earlier complaint were held in this case to be a judgment on the merits. Appellant's arguments exalt pure technicalities to a wholly unwarranted degree. * * *

In the course of its opinion, the Court of Appeals also said (R. 253):

> There may have been an error by the district court in its refusal to add the words, proposed by the government, that the dismissal of the

complaint should be "without prejudice". However, this error, if it was an error, could have been corrected on appeal, and no appeal was taken from the district court's order of dismissal.

In the petition for a writ of certiorari, filed by petitioner on March 18, 1960, he did not attack the ruling of the Court of Appeals that the prior dismissal failed to bar the present action. His alleged reason for attempting to do so a month later (in his motion to amend the petition) was that the Solicitor General, by filing a petition for a writ of certiorari in *United States* v. *Lucchese*, No. 57, this Term, had indicated that "the nature and effect of dismissals entered pursuant to the mandate of a higher court raise serious questions which should be resolved by this Court" (Motion, p. 3). However, as appears from our petition and brief in *Lucchese*,[25] the government has consistently taken the position in *Lucchese* that it was merely attempting to protect its rights in the event of an adverse decision by this Court in the present case if petitioner's certiorari petition should raise the *res judicata* issue and this Court accept it. We did not consider the issue worthy of review in itself. Indeed, since petitioner's original petition did not raise this question, the government had already moved to dismiss its *Lucchese* petition before it was

[25] The *Lucchese* petition for certiorari had to be filed by the government before petitioner had filed his petition, at a time when we did not know what questions petitioner would present to this Court.

served with, or had heard about, petitioner's present motion. There is therefore no reason to relieve petitioner of the consequences usually flowing from a failure to raise an issue of which he is fully aware.

We do not question the power of the Court to grant petitioner's motion to amend, and to consider the *res judicata* issue on its merits—especially since the motion was filed within the 90-day period for filing a petition for certiorari. But we do argue that petitioners should not be allowed to supplement their petitions by raising new questions after filing their original petitions unless they show good reason for failing to present the new question at the proper time. The orderly presentation to, and decision by, this Court of certiorari petitions would be much disrupted if parties were free to supplement their petitions by amendments and additions raising new issues. The Court's rules and practice do not contemplate such a procedure (see Rules 23(1)(c) and 40(1)(d)), and we submit that it should not be contenanced unless very good cause is shown. In this case, petitioner has shown no cause whatever for failing to raise the issue of *res judicata* in his petition. His reliance on the government's petition in *Lucchese* is wholly unwarranted, as we have shown, and he points to nothing else excusing his failure.

V

A SECOND DENATURALIZATION PROCEEDING IS NOT BARRED BY THE FAILURE OF THE DISTRICT COURT TO SPECIFY, IN THE ORDER DISMISSING THE ORIGINAL DENATURALIZATION COMPLAINT, THAT THE DISMISSAL IS WITHOUT PREJUDICE TO THE FILING OF A NEW COMPLAINT, WHERE THE DISMISSAL WAS ENTERED AT THE DIRECTION OF THIS COURT FOR FAILURE TO FILE THE AFFIDAVIT OF GOOD CAUSE WITH THE COMPLAINT

In *United States* v. *Zucca*, 351 U.S. 91, this Court, in reliance upon the wording of Section 340(a) of the 1952 Act, held that the filing of a contemporaneous affidavit of good cause is an essential procedural prerequisite to initiation and maintenance of a denaturalization proceeding, *id.*, at 99, 100. On the basis of this ruling, this Court reversed *Costello* v. *United States* (together with *Matles* v. *United States*, and *Lucchese* v. *United States*) 356 U.S. 256, and remanded the case to the District Court with directions that the trial court dismiss the complaint (*id.*, at 257). The district judge, believing that he was bound to follow the mandate and powerless to go beyond its express terms, entered an order dismissing the complaint without specifying whether the dismissal was to be considered as with or without prejudice (R. 253).

Rule 41(b), F. R. Civil P., *supra*, pp. 4–5, concerns itself with the effect of an involuntary dismissal of an action. It provides, *inter alia*, that "[u]nless the court in its order for dismissal otherwise specifies, a dismissal under this sub-division, and any dismissal not provided for in this rule, other than a dismissal for

lack of jurisdiction or for improper venue, operates as an adjudication upon the merits." It is petitioner's position (Brief, pp. 44–49) that the dismissal ordered by this Court operated as an adjudication upon the merits, and bars the present action on principles of *res judicata*. The government's answer is that the dismissal of the earlier complaint was for failure to comply with a *quasi*-jurisdictional requirement, and that this is a dismissal for "lack of jurisdiction" within the meaning of Rule 41(b). We also show that the Court of Appeals was justified in its view that Rule 41(b) ought to be restricted to situations where the District Court exercises, or purports to exercise, some measure of discretion in its ruling.[20]

A. *The dismissal of the first action was for lack of jurisdiction, as that term is used in Rule 41(b), F.R. Civil P.*

1. *The dismissal was for a quasi-jurisdictional defect.*

"Jurisdiction" is a word of shifting meaning covering a large field. In one sense, it refers to the power of the court to act in a particular case. A court acts without jurisdiction when it undertakes to decide a case of a class which is not within its competence—as where a federal court undertakes to punish a state

[20] Because an issue had been raised by petitioner in this case as to the *res judicata* effect on the merits of the government's failure to appeal the order dismissing the first action, the government did appeal in *Lucchese*. In *United States* v. *Lucchese*, No. 57, this Term, we point out that this Court contemplated a dismissal without prejudice when it reversed the prior suit, that the District Court had the power to enter a judgment specifically so providing, and that it erred when it failed to do so.

crime committed on state territory. A court also acts without jurisdiction where there has been no valid service of process and the defendant has not submitted to the jurisdiction of the court. This is basic fundamental jurisdiction. An attempt by a court to act without this type of bedrock jurisdiction is invalid, and judgments entered under such circumstances are subject to collateral attack. Petitioner argues, and we agree, that the failure to file an affidavit of good cause is not the kind of condition which goes to the very core of the denaturalization proceeding so that a judgment rendered without compliance therewith would be subject to collateral attack as beyond the competence of a District Court. *Title* v. *United States,* 263 F. 2d 28, 30 (C.A. 9), certiorari denied, 359 U.S. 989; *United States* v. *Failla,* 164 F. Supp. 307, 313–315 (D.N.J.).

That, however, is not the only sense in which the term jurisdiction is used. "Jurisdiction" is a term also applied to conditions precedent to a decision by the federal court on the merits of the controversy which, if raised in the original action, bar a decision on the merits, even though lack of compliance therewith will not subject a final judgment to collateral attack. As this Court put it in *Noble* v. *Union River Logging Railroad Company,* 147 U.S. 165, 173–174, after discussing what it regarded as minimal jurisdiction requirements:

> There is, however, another class of facts which are termed *quasi* jurisdictional, which are necessary to be alleged and proved in order to set the machinery of the law in motion, but

> which, when properly alleged and established to the satisfaction of the court, cannot be attacked collaterally. * * * [In such cases] the want of jurisdiction does not go to the subject-matter or the parties, but to a preliminary fact necessary to be proven to authorize the court to act.

Thus, lack of diversity of citizenship is a proper basis for a motion to dismiss for lack of jurisdiction when asserted in the main action, *Kelly* v. *Tribune-Star Publishing Company*, 152 F. 2d 267–268 (C.A. 7); *Kern* v. *Standard Oil Company*, 228 F. 2d 699, 701 (C.A. 8); but an otherwise valid decree may not be collaterally attacked for that reason. *Des Moines Navigation and Railroad Company* v. *Iowa Homestead Company*, 123 U.S. 552, 556–559; *McCormick* v. *Sullivant*, 10 Wheat. 192, 199. Such decrees "are not absolute nullities" (*ibid*). Similarly, a motion to dismiss, filed in the main action, for lack of "jurisdiction over the subject matter" should be granted where the damages claimed for breach of contract is less than the minimum amount required by statute (28 U.S.C. 1332), *Gibbs* v. *Buck*, 307 U.S. 66, 72; *Parmelee* v. *Ackerman*, 252 F. 2d 721 (C.A. 6); but such a defect, when not raised, does not render the judgment or decree null and void. *In Re Sawyer*, 124 U.S. 200, 220–221; see *International News Service* v. *Associated Press*, 248 U.S. 215, discussed in *KVOS, Inc.* v. *Associated Press*, 299 U.S. 269, 279.

The failure to file an affidavit of good cause at the time when the complaint is filed in a denaturalization suit is a defect of this character; it amounts to what the courts have called a *quasi*-jurisdictional defect.

It is sufficiently jurisdictional to be available to the defendant so long as the case pends on direct review, *Costello* v. *United States, supra,* 356 U.S. 256, even though, not being a defect which goes to the power to deal with the subject matter of the action or the jurisdiction over the parties, it is not a defect which would render a judgment subject to collateral attack.

2. *"Lack of jurisdiction," as that term is used in Rule 41(b), includes dismissal for a quasi-jurisdictional defect.*

We think it is evident that, when Rule 41(b) provides that dismissals for lack of jurisdiction shall not operate as a dismissal with prejudice, it encompasses dismissals for *quasi*-jurisdictional defects such as the absence of an affidavit of good cause. The manifest purpose of the Rule's exception for dismissals for lack of jurisdiction or venue is not to foreclose a party who has not had an adjudication on the merits of his claim or an opportunity to adjudicate the merits.[7] Certainly, dismissal of a complaint for failure to file an affidavit of good cause in no sense involves an adjudication on the merits.

Moreover, since the rule is directed toward regulation of practice in a pending case, it is naturally read as relating to all those matters which constitute the "jurisdiction" of the court to proceed with the pending case rather than as being limited to those basic jurisdictional matters which are always available, even on

[7] To the extent that the rule authorizes dismissal with prejudice for lack of prosecution or failure to comply with an order, it allows a court to penalize one who, by his dilatory tactics, in effect prevents adjudication.

collateral attack. As noted *supra,* there are a number of requirements, such as diversity of citizenship or amount in suit, which are considered "jurisdictional defects" when attacked directly, although they do not form a proper basis for collateral attack. Dismissals "for lack of jurisdiction", within the meaning of Rule 41(b), in the normal course of events, are rulings which are responsive to motions made on an appropriate jurisdictional ground under Rule 12(b). See *Galdi et al.* v. *Jones et al.,* 141 F. 2d 984, 992 (C.A. 2). The latter Rule states, *inter alia,* that:

> Every defense, in law or fact, to a claim for relief in any pleading * * * shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party.

It is evident that one may move to dismiss for lack of jurisdiction under Rule 12(b) on a *quasi*-jurisdictional, as well as on a basic jurisdictional, ground. *E.g., Gibbs* v. *Buck,* 307 U.S. 66, 72, and other cases discussed *supra,* p. 74. *Madden* v. *Perry,* 264 F. 2d 169 (C.A. 7), certiorari denied, 360 U.S. 931, illustrates our views as to Rule 41(b). There, the Regional Director for the Thirteenth Region of the National Labor Relations Board had filed a petition for injunction against the defendant, alleging the com-

mission of an unfair labor practice under 29 U.S.C. 158(b)(4)(A). 29 U.S.C. 160(l) requires the Regional Director to conduct a preliminary investigation before filing such a petition. The defendant asserted that no preliminary investigation had been conducted; the Regional Director refused to say anything about the matter; and the District Court dismissed the petition for injunction on the ground that the Regional Director had no right to maintain the action. Later the District Court attempted to enter supplemental findings disposing of the Regional Director's petition on its merits. The Regional Director sought, in the Court of Appeals, a writ of mandamus directing the District Court to vacate its supplemental findings. The Court of Appeals issued the writ of mandamus, holding that the original order of dismissal was a final order which did not involve the merits of the case and that the supplemental findings were therefore not germane to any pending action. The court went on to hold squarely that the dismissal for failure to fulfill a condition precedent to the right to maintain the action was a dismissal for "lack of jurisdiction" within the meaning of Rule 41(b), F.R. Civil P. "[T]he dismissal was based upon a failure of a jurisdictional requirement, which is expressly excepted from the operation of rule 41(b) [as an adjudication on the merits]." 264 F. 2d 174–175.

The failure to file an affidavit of good cause was the basis for a motion to dismiss for lack of "jurisdiction of the subject matter of the action" in *Lucchese* v.

United States, 356 U.S. 256, and *United States* v. *Diamond*, 356 U.S. 257 (No. 450, O.T. 1957, R. 23, 28, 34; No. 771, O.T. 1957, R. 20, 22).[28] This Court's ruling in those cases was a holding that such motions for lack of "jurisdiction of the subject matter" should have been granted. The order of dismissal pursuant to the mandate of this Court was therefore a dismissal for "lack of jurisdiction" under Rule 41(b).

B. Rule 41(b) applies only to those cases where the District Court purports to exercise some discretion in ordering an involuntary dismissal with prejudice.

As we have set forth in the Statement, *supra*, pp. 15–16, the Court of Appeals reasoned that Rule 41(b) should apply only to cases in which the trial court exercises some discretion in ordering a dismissal. It noted that there must be some guide to interpreting "a bare 'dismissal' ", and that the Rule furnished such a guide in all cases where the trial court has a real discretion in deciding the effect of the order to be entered. In a case such as this, however, where a superior court has directed the entry of a dismissal and the District Court believes itself powerless to add anything at all to the order of dismissal, "it would be a violation of the intention of all the courts concerned if the dismissal of the earlier complaint were held in this case to be a judgment on the merits" (R. 255).

The Court of Appeals' conclusion—that Rule 41(b)

[28] The District Court's original dismissal without prejudice in *United States* v. *Costello*, 145 F. Supp. 892, was based on the ground that the government's evidence and the affidavit of good cause were tainted by wiretapping. See *supra*, pp. 5–6, fn. 2.

applies only to discretionary rulings—is supported by the logic of the Rule itself. Rule 41(b) expressly treats three situations as grounds for "dismissal under this subdivision" (*supra*, pp. 4–5): (1) failure to prosecute, (2) failure to comply with the rules or any order of court, and (3) failure, upon the facts and the law, to show a right to relief. In all of these situations, the trial court is called upon to exercise a measure of discretion, and the defect alleged, if actually shown to exist, is sufficiently serious to warrant judgment on the merits against the plaintiff. See *United States* v. *Procter & Gamble Company, et al.*, 356 U.S. 677, 679–680; *Shaffer* v. *Evans*, 263 F. 2d 134, 135 (C.A. 10), certiorari denied, 359 U.S. 990; *Edmond* v. *Moore-McCormack Lines, Inc.*, 253 F. 2d 143, 144 (C.A. 2); *Garden Homes, Inc.* v. *Mason*, 249 F. 2d 71, 72 (C.A. 1); *Feinberg* v. *Leach*, 243 F. 2d 64, 67–68 (C.A. 5). And dismissals "not provided for in this rule", but bound by its terms as to prejudice, also involve the exercise of discretion, or at least the exercise of a power to decide the terms of the order, by the District Court. See *Societe Internationale* v. *Rogers*, 357 U.S. 197, 213 (dismissal under Rule 37, for noncompliance with production order, held a matter of discretion, but not justified when plaintiff attempts good-faith compliance); *Weeks* v. *Barco*, 125 F. 2d 84, 87, 93–95 (C.A. 7) (District Court has discretion as to whether an action may be maintained as a class action under Rule 23).

In *United States* v. *Lucchese*, No. 57, this Term, we argue that the District Court erred in entering a bare

dismissal when the earlier denaturalization case was returned to the trial forum, in that this Court's decision in *Costello* v. *United States*, 356 U.S. 256, contemplated, and applicable precedents permitted, the addition of the words "without prejudice". But from the point of view of the district judge, who believed that he lacked power to go beyond the words of the mandate at all, the entry of the order of dismissal was a purely mechanical act. It did not involve the exercise of any discretion, did not depend upon the existence of any intentional fault on the part of the government (such as failure to prosecute or obey a court order), was not related to, and did not express any view as to, the merits of the case. To say that Rule 41(b) applies to such an order is, in the words of the Court of Appeals, to "exalt pure technicalities to a wholly unwarranted degree" (R. 255).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed, and that petitioner's motion to amend his petition for a writ of certiorari should be denied.

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SUPREME COURT OF THE UNITED STATES

No. 59.—October Term, 1960.

Frank Costello, Petitioner, v. United States of America. | On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[February 20, 1961.]

Mr. Justice Brennan delivered the opinion of the Court.

The petitioner became a naturalized citizen on September 10, 1925. The District Court for the Southern District of New York revoked his citizenship on March 9, 1959, in this proceeding brought by the Government under § 340 (a) of the Immigration and Naturalization Act of 1952. That Act authorizes revocation of naturalized citizenship "on the ground that such order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation . . . ."[1] The petitioner, in 1925, swore in his

[1] The statute, 66 Stat. 260, as amended, 68 Stat. 1232, 8 U. S. C. § 1451, reads in pertinent part as follows:

"(a) *Concealment of material evidence; refusal to testify.*

"It shall be the duty of the United States attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 1421 of this title in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively . . . ."

Preliminary Form for Naturalization, in his Petition for Naturalization, and when he appeared before a Naturalization Examiner, that his occupation was "real estate." The District Court found that this was "willful misrepresentation and fraud" and that "his true occupation was bootlegging." 171 F. Supp. 10, 16. The Court of Appeals for the Second Circuit affirmed, 275 F. 2d 355. We granted certiorari. 362 U. S. 973.

An earlier denaturalization complaint brought under 8 U. S. C. (1946 ed.) § 738 (a), the predecessor of § 340 (a), was dismissed on the ground that wiretapping may have infected both the Government's affidavit of good cause and its evidence. *United States* v. *Costello*, 145 F. Supp. 892. The Court of Appeals for the Second Circuit reversed on the ground that the Government should have been afforded an opportunity to show that its evidence either was untainted or was admissible in any event. 247 F. 2d 384. We granted certiorari and reversed, 356 U. S. 256, on a ground not considered below, namely, that the affidavit of good cause, which is a prerequisite to the initiation of denaturalization proceedings under § 340 (a), *United States* v. *Zucca*, 351 U. S. 91, was not filed with the complaint. On remand the District Court declined to enter an order of dismissal "without prejudice" and entered an order which did not specify whether the dismissal was with or without prejudice. The Government did not appeal from that order but brought this new proceeding under § 340 (a) by affidavit of good cause and complaint filed on May 1, 1958.

The petitioner argues several grounds for reversal of the order revoking his citizenship. He contends: (1) that the finding that he willfully misrepresented his occupation is not supported by clear, unequivocal, and convincing evidence, the standard of proof required of the Government in these cases; (2) that some of his admissions as to his true occupation at the time of his naturalization were

tainted by wiretapping, and thus were not evidence which the District Court might rely upon in reaching its conclusion; (3) that in the circumstances of this case the lapse of 27 years from the time of the petitioner's naturalization to the time of the filing in 1952 of the Government's first complaint should be deemed to bar the Government from instituting this proceeding; (4) that the second denaturalization proceeding was barred under Rule 41 (b) of the Rules of Civil Procedure by the failure of the District Court on remand of the first proceeding to specify that the dismissal was "without prejudice" to the filing of a new complaint.

We find no merit in any of these contentions.[2] The judgment of the Court of Appeals will be affirmed.

I.

The Government carries a heavy burden of proof in a proceeding to divest a naturalized citizen of his citizenship. American citizenship is a precious right. Severe consequences may attend its loss, aggravated when the person has enjoyed his citizenship for many years. See *Schneiderman* v. *United States*, 320 U. S. 118, 122–123; *Nowak* v. *United States*, 356 U. S. 660, 663. In *Chaunt* v. *United States*, 364 U. S. 350, 352–353, we said:

> "Acquisition of American citizenship is a solemn affair. Full and truthful response to all relevant questions required by the naturalization procedure is, of course, to be exacted, and temporizing with the truth must be vigorously discouraged. Failure to

[2] The District Court also found that the petitioner knowingly and willfully swore false allegiance to the Constitution and laws of the United States. Like the Court of Appeals, 275 F. 2d, at 360, we find it unnecessary to pass upon the petitioner's attack upon this finding, since we think that the revocation of his citizenship on the first ground was clearly correct.

give frank, honest, and unequivocal answers to the court when one seeks naturalization is a serious matter. Complete replies are essential so that the qualifications of the applicant or his lack of them may be ascertained. Suppressed or concealed facts, if known, might in and of themselves justify denial of citizenship. Or disclosure of the true facts might have led to the discovery of other facts which would justify denial of citizenship.

"On the other hand, in view of the grave consequences to the citizen, naturalization decrees are not lightly to be set aside—the evidence must, indeed be 'clear, unequivocal, and convincing' and not leave 'the issue . . . in doubt.' *Schneiderman* v. *United States*, 320 U. S. 118, 125, 158; *Baumgartner* v. *United States*, 322 U. S. 665, 670. The issue in these cases is so important to the liberty of the citizen that the weight normally given concurrent findings of two lower courts does not preclude reconsideration here . . . ."

In 1925 a known bootlegger would probably not have been admitted to citizenship. Decisions before and after the repeal of the Eighteenth Amendment held that the applicant who trafficked in the sale, manufacture, or transportation of intoxicating liquors during Prohibition, within the five years preceding his application, did not meet the statutory criterion that an applicant must have behaved as a person "of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same." Act of 1906, § 4, 34 Stat. 596, 598.

In *United States* v. *De Francis*, 50 F. 2d 497, 498, the Court of Appeals for the District of Columbia stated: "Any person who violates the provisions of the Prohibition Act violates the principles of the Constitution of the United States, and cannot be held to be attached to the

principles of the Constitution of the United States. Nor can it be said that such a person possesses good moral character."

In *Turlej* v. *United States*, 31 F. 2d 696, 699, it was said, "Few cases can be found where applicants for citizenship have been admitted, if guilty of violating liquor laws within the five years preceding the hearing, and such cases have been severely criticized by the courts. This was true even before the adoption of the Eighteenth Amendment as a part of our national Constitution." See also *In re Trum*, 199 F. 361.

In *United States* v. *Villaneuva*, 17 F. Supp. 485, 487, the court said, "Courts have quite universally held that violations of prohibition liquor laws, whether national or state, should be taken into consideration in determining questions respecting the good moral character of applicants for citizenship and their attachment to the principles of the Constitution of the United States."

In *United States* v. *Mirsky*, 17 F. 2d 275, a denaturalization case, Judge Thacher of the District Court for the Southern District of New York, who had admitted Costello to citizenship less than a year earlier, said: "One who deliberately violates the Eighteenth Amendment of the Constitution cannot be said to be attached to the principle declared by that amendment." P. 275. "Neither the fact that in this and in other communities there are many citizens who are not attached in thought or deed to the principle embodied in the Constitution by the Eighteenth Amendment, nor the fact that opposition to that principle with a view to removing it from the Constitution is quite generally thought to be the part of good citizenship, can relieve this court of its duty to apply the law as it is now written." P. 276.

See also *In re Nagy*, 3 F. 2d 77; *In re Raio*, 3 F. 2d 78; *In re Phillips*, 3 F. 2d 79; *In re Bonner*, 279 F. 789; *Ex parte Elson*, 299 F. 352.

Some of these cases turned on a finding of illegal procurement of the certificate because of demonstrated lack of attachment to the principles of the Constitution rather than upon "fraud" under 8 U. S. C. § 738 (a).[3] However, the cases demonstrate the materiality of the concealment by the petitioner of his bootlegging if that in fact was his true occupation. Such concealment would support the conclusion that he was an applicant who had "[s]uppressed or concealed facts . . . [which] . . . if known,

[3] Section 340 (a) authorizes denaturalization on the single ground of "concealment of a material fact or . . . willful misrepresentation." Its predecessors, § 338 (a) of the Immigration Act of 1940, and § 15 of the original Act of Congress in 1906 giving statutory basis for denaturalization, authorized denaturalization for "fraud" or illegal procurement. The change from "fraud" to "concealment of a material fact or . . . willful misrepresentation" apparently was made primarily to remove doubts as to whether denaturalization could be based on so-called "intrinsic" fraud, fraud through false swearing in the naturalization proceedings, or only on the traditional equity ground for cancellation of a judgment, "extrinsic" fraud, inhering in activities collateral to the proceedings themselves such as the concealment of witnesses from the court. Certain lower court cases had indicated that only extrinsic fraud might be encompassed within the term, compare *United States* v. *Kusche*, 56 F. Supp. 201, with *United States* v. *Hauck*, 155 F. 2d 141, in accordance with the rule that had apparently been applied to revocation of a judgment admitting to citizenship prior to the Act of 1906, see *United States* v. *Gileeson*, 90 F. 778; cf. *United States* v. *Norsch*, 42 F. 417. Congress thus acted in 1952 to make it clear that false statements in the course of the naturalization proceedings could be the basis for revocation of citizenship. See S. Rep. No. 1515, 81st Cong., 2d Sess. 756–769. But there appears no congressional purpose to lay down a looser definitional standard for "willful misrepresentation" or laxer requirements of proof than had previously been applied by the courts which held misstatements during naturalization proceedings to constitute fraud under the prior statutes. The practice of the Immigration and Naturalization Service apparently treated "fraud" under the older Acts as involving willful misrepresentation or concealment of material facts. See S. Rep. No 1515, 81st Cong., 2d Sess. 756.

might in and of themselves justify denial of citizenship." *Chaunt v. United States, supra,* at 352-353.

We have examined the record to determine if the evidence leaves "the issue in doubt." *Schneiderman v. United States,* 320 U. S. 118, 158, whether the petitioner procured his naturalization by willfully misrepresenting that his occupation was real estate. It does not. However occupation is defined, whether in terms of primary source of income, expenditure of time and effort, or how the petitioner himself viewed his occupation, we reach the conclusion that real estate was not his occupation and that he was in fact a large-scale bootlegger.

The Government built its case on a solid foundation of admissions made by the petitioner in several federal and New York State inquiries beginning in 1938. In that year he admitted to a Special Agent of the Bureau of Internal Revenue that he had engaged in the illicit liquor business from 1923 or 1924 until a year or two before the repeal of the Eighteenth Amendment in 1933. In 1939 he testified before a federal grand jury in the Southern District of New York that "I did a little bootlegging. . . . The last time was around 1926." In 1943 he testified before a New York County grand jury that he had been in the liquor business in the twenties and had an office at 405 Lexington Avenue, New York City, as early as 1925. He also admitted that he had reported an aggregate income of $305,000 for New York State income tax purposes for the years 1919 to 1932 and that "[m]aybe most of it" was earned in the bootlegging business. Indeed, except for $25,000 realized from a real estate venture to be discussed shortly, there was no evidence of income from any legitimate business. In 1943, in a proceeding before an Official Referee of the Appellate Division of the Supreme Court of New York he acknowledged that money he had lent to Arnold Rothstein, prior to the

latter's murder in 1928, might have been derived "from a little bootlegging"; he also admitted that during the Prohibition era his business of smuggling alcoholic liquors into the United States was "profitable." In 1947 he appeared before the New York State Liquor Authority and testified that from 1923 to 1926 he operated a bootlegging business from 405 Lexington Avenue.

Several of his associates in bootlegging enterprises presented a picture of large-scale operations by the petitioner from early in Prohibition past the time of his application for citizenship. Emmanuel Kessler, a big operator apprehended in 1923 and convicted for his activities, financed, about 1921, the petitioner's purchase of trucks to haul Kessler's liquors after Kessler landed them on Long Island from boats on the high seas. Kessler "very often" discussed shipments with the petitioner in telephone calls to the Lexington Avenue office. Kessler's volume at the time was about 3,000 cases per week and he paid the Costello organization approximately $6,000 a week for haulage and storage. Kessler said that before he began serving his sentence "Frank Costello personally asked me . . . for some money so he could continue on. I think I left him either 100 or 200 cases."

Frank Kelly, who began bootlegging about 1922, smuggled liquors into the country using a chartered ship which he moored off the Long Island shore. He became associated with the petitioner in 1925 when he was introduced to the petitioner and the petitioner's Canadian representative, Harry Sausser, at Montauk, Long Island. On this occasion, Sausser negotiated with Kelly for the storage of liquors on Kelly's boat. Kelly was one of a combine including the petitioner which was indicted in 1925 for conspiracy to violate the liquor laws.

Phillip Coffey, also indicted with the petitioner in 1925, was a former Kessler employee. He purchased liquor from the Costello organization at 405 Lexington Avenue as early as 1922 or 1923. He insisted that he did "all my

business with Eddie Costello," the petitioner's brother, but admitted placing orders with Edward in the petitioner's presence and discussing purchases with the petitioner. Coffey told of an occasion, which he thought occurred in 1925, when Kelly and the petitioner came by automobile to Montauk Point and Kelly gave him instructions for the removal of liquor from Kelly's chartered schooner. He said that he was paid for his services at petitioner's Lexington Avenue office by Edward Ellis, the petitioner's bookkeeper.

Albert Feldman, another admitted bootlegger, started in 1920 and dealt with both the petitioner and Kessler. He arranged with the petitioner about 1928 at the Lexington Avenue office to have the petitioner haul and store some liquor for him. He also talked with the petitioner regarding its sale. The petitioner told Feldman he had "a customer for the 1000 cases," that he "could sell them and he would be able to pay me in a few days, as soon as they were delivered, to which I agreed; and Frank said that 'I'll be responsible for the money.'" In regard to the petitioner's role in liquor transactions, Feldman said, "everything was Frank Costello. He was the businessman. He did all the business."

Helen L. Sausser, daughter of Harry Sausser, was 18 when she became acquainted with the petitioner in 1925. Sausser was one of the two persons who executed the affidavit attached to the petitioner's Petition for Naturalization and swore that he also was in the real estate business. The daughter recalled overhearing conversations between petitioner and her father about liquor, and said that her father admitted to her mother that he was engaged in bootlegging. The daughter testified that she had never known her father to engage in the real estate business.

Despite these strong proofs of the falsity of the petitioner's answers, the petitioner insists that the evidence derived from the Government's own investigation of his

activities in the real estate business should leave us with a troubling doubt whether he stated falsely that he was engaged in that occupation. He had told the New York grand jury in 1943, when asked what "other occupation" besides bootlegging he followed during Prohibition, that "I was doing a little real estate at that time." The Government put in evidence in this proceeding state corporate records and records from the Registries of Deeds in New York City. These show that petitioner was indeed identified with three corporations empowered to engage in the purchase and sale of real estate. We dismiss two of the corporations, organized in 1926, without further mention beyond the fact that the petitioner testified before the Official Referee in the Appellate Division that his investment of $25,000 or $30,000 in one of them came from "bootlegging or gambling"; there was no evidence of any real estate transactions involving either company. The petitioner's contention must therefore be tested in the light of the activities of Koslo Realty Corporation. This corporation was organized in December 1924 and at least as early as August 1925 listed its address as the petitioner's office, 405 Lexington Avenue. A December 1925 document lists the petitioner as president of the company. The only evidence of any investment by the petitioner or profitable transaction in which he engaged before May 1, 1925, when he filed his Petition for Naturalization, concerned a property at West End Avenue and 92d Street, Manhattan, acquired by the corporation in December 1924. The petitioner admitted before the New York County grand jury that his investment in that transaction was from earnings in "gambling or liquor" and claimed that he made a profit of $25,000 on the sale of the property in June 1925. The only other transactions occurred after May 1, 1925. The corporation bought lots in the Bronx in August and October 1925. Some of the lots were improved and all of them were sold in 1926.

These proofs raise no troubling doubt in our minds. They do not support an inference that his occupation was real estate. They show only that the petitioner invested his illicit earnings in real estate transactions with the hope of profit. But he was neither deriving his principal income from Koslo Realty Corporation, spending any appreciable time conducting its affairs, nor making it his central business concern. He himself admitted that he operated his bootlegging enterprises from the Lexington Avenue address. All of the witnesses who testified to activities at that address recounted bootlegging transactions and not one in real estate. And the postman who delivered mail to the office from 1924 to 1926, and saw the petitioner there several times a week, saw neither a secretary nor typewriter as might be expected in an active real estate business.

The Government's proofs show not merely that the petitioner's statements were factually incorrect, but show clearly, unequivocally, and convincingly that the statements were willfully false. The petitioner argues that the evidence is susceptible of the inference that he may have believed that the questions called for the disclosure only of a legal occupation. We may assume that "occupation" can be a word of elusive content in some circumstances, like the question involved in *Nowak* v. *United States*, *supra*, and *Maisenberg* v. *United States*, 356 U. S. 670, upon which decisions the petitioner relies. But that argument of ambiguity is farfetched here. No one in the petitioner's situation could have reasonably thought that the questions could be answered truthfully as they were. It would have been a palpable absurdity for him to think that his occupation was real estate; he actually had no legal occupation. On this record, his only regular and continuing concern was his bootlegging upon which he depended for his livelihood. He only dabbled in real estate and by his own admission financed even this side-

line from "liquor or gambling." We need not determine whether the evidence supports the conclusion that petitioner organized Koslo Realty Corporation to provide him with a facade or front to mislead the law-enforcement authorities as to his true occupation, although the appearance of a legitimate occupation was obviously convenient for him and his group. We are convinced, however, that the petitioner counted upon the corporation to give plausibility to his representation as to his occupation when he applied for citizenship.

Our conclusion that his representations were willfully false is reached without reliance upon an inference from the failure of the petitioner to take the stand in this proceeding and testify in his own behalf. The Court of Appeals made some comments as to the significance of the petitioner's failure to testify, 275 F. 2d, at 358, but we do not read its opinion as basing the affirmance of the District Court's order upon such an inference. The district judge, whose order the Court of Appeals affirmed, made none. The evidence so strongly supports the District Court's conclusion that the aid of the inference was unnecessary to buttress it. We therefore find it unnecessary to decide in this case whether an inference may be drawn in a denaturalization proceeding from the failure of the defendant to present himself as a witness.

II.

The contention that illegal wiretapping precluded reliance upon the petitioner's admissions rests primarily upon interrogations by New York County District Attorney Frank Hogan in 1943 when the petitioner appeared before the New York County grand jury and the Official Referee in the Appellate Division. State officers had a tap on the petitioner's telephone during several months of 1943. Mr. Hogan made frequent references to the tapped conversations when questioning the petitioner.

The petitioner claims that his admissions of bootlegging activities during Prohibition were impelled by the belief that Mr. Hogan had learned from the tapped conversations the information sought by the questions. It is argued that the wiretaps were illegal under our decision in *Benanti* v. *United States*, 355 U. S. 96, and that his admissions were therefore to be excluded from evidence as "fruits of the poisonous tree," on the reasoning in *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, and *Nardone* v. *United States*, 308 U. S. 338.

The short answer to this contention is that we conclude from the record that his truthful answers to Mr. Hogan's questions were not given because he thought that the conversations tapped in 1943 revealed his activities in the Prohibition era, but because he realized that these facts had been known to the authorities for some time. None of Mr. Hogan's questions even implies that Mr. Hogan gained his information from the 1943 wiretaps. Mr. Hogan had a transcript of the 1939 federal grand jury minutes of the petitioner's appearance before that body. The petitioner presses no argument in this Court that his admissions before that grand jury were infected with wiretapping. Early in Mr. Hogan's examination, the petitioner admitted that he recalled being questioned before the grand jury in 1939. The questioning at that proceeding had elicited the petitioner's admission of his bootlegging. Furthermore, his arrest and trial under the 1925 indictment for conspiracy to violate the liquor laws were matters of public record. And in 1938 the petitioner had also admitted his bootlegging to the agent for the Bureau of Internal Revenue. It is plain common sense to conclude that this information, long a matter of official knowledge, not something which he thought might have been disclosed in the 1943 wiretaps, impelled the petitioner to answer Mr. Hogan truthfully.

Moreover, District Attorney Hogan testified in the present proceeding. He expressly disavowed that his questions of the petitioner as to his activities during Prohibition were based on the 1943 wiretaps. He testified that his information was derived from files of the District Attorney's office, newspaper reports and court records. Although one of the intercepted telephone conversations was between the petitioner and one O'Connell, a codefendant in the 1925 Prohibition prosecution, Mr. Hogan stated that none of the 1943 wiretaps concerned the petitioner's bootlegging activities. The 1943 grand jury and Appellate Division investigations were concerned only with the petitioner's part in the nomination that year of a candidate for Justice of the State Supreme Court.

It is true that the 1943 wiretaps prompted the calling of the petitioner before the county grand jury and the Official Referee. But the "fruit of the poisonous tree" doctrine excludes evidence obtained from or as a consequence of lawless official acts, not evidence obtained from an "independent source." *Silverthorne Lumber Co.* v. *United States*, *supra*, at 392. We said in *Nardone* v. *United States*, 308 U. S. 338, 341, "Sophisticated argument may prove a causal connection between information obtained through illegal wire-tapping and the Government's proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint." We are satisfied that any knowledge in Mr. Hogan's possession which impelled the petitioner to answer truthfully came from such independent sources and that any connection between the wiretaps and the admissions was too attenuated to require the exclusion of the admissions from evidence.[4]

[4] The petitioner makes reference to the opinion of the District Court rendered upon the dismissal of the first complaint. That opinion rested the conclusion that the affidavit of good cause and the evidence were infected with wiretapping partly upon wiretaps said

III.

In contending that lapse of time should be deemed to bar the Government from instituting this proceeding, the petitioner argues that the doctrine of laches should be applied to denaturalization proceedings, and that in any event, the delay of 27 years before bringing denaturalization proceedings denied him due process of law in the circumstances of the case.

It has consistently been held in the lower courts that delay which might support a defense of laches in ordinary equitable proceedings between private litigants will not bar a denaturalization proceeding brought by the Government. See *United States* v. *Ali*, 7 F. 2d 728; *United States* v. *Marino*, 27 F. Supp. 155; *United States* v. *Cufari*, 120 F. Supp. 941, reversed on other grounds, 217 F. 2d 404; *United States* v. *Parisi*, 24 F. Supp. 414; *United States* v. *Brass*, 37 F. Supp. 698; *United States* v. *Spohrer*, 175 F. 440; *United States* v. *Reinsch*, 50 F. Supp. 971, reversed on other grounds, 156 F. 2d 678; *United States* v. *Schneiderman*, 33 F. Supp. 510, reversed on other grounds, 320 U. S. 118. These cases have applied the principle that laches is not a defense against the sovereign. The reason underlying the principle, said Mr. Justice

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to have been made in the 1920's. The district judge found "indications of the extensive use of wire taps" covering a period of many years and beginning in the 1920's." 145 F. Supp., at 894. However, the district judge in this proceeding heard the testimony of two former Assistant United States Attorneys who conducted the investigation leading to the petitioner's indictment in 1925. The district judge "accepted as true" their testimony "that the Government's information as to the bootlegging activities of Costello was not derived from telephone conversations but was derived from statements of certain individuals acquainted with the defendant's activities." 171 F. Supp., at 25. We see no basis for disturbing this finding and the District Court's conclusion that no taint from wiretaps in the 1920's infected the later admissions made by the petitioner.

Story, is "to be found in the great public policy of preserving the public rights, revenues, and property from injury and loss, by the negligence of public officers." *United States* v. *Hoar*, 26 Fed. Cas. 329, 330 (No. 15,373). This Court has consistently adhered to this principle. See, for example, *United States* v. *Kirkpatrick*, 9 Wheat. 720, 735–737; *United States* v. *Knight*, 14 Pet. 301, 315; see also *United States* v. *Summerlin*, 310 U. S. 414, 416; *Board of County Commissioners* v. *United States*, 308 U. S. 343, 351; *United States* v. *Thompson*, 98 U. S. 486, 489.

None of the cases in this Court considered the question of the application of laches in a denaturalization proceeding. However, even if we assume the applicability of laches, we think that the petitioner failed to prove both of the elements which are necessary to the recognition of the defense. Laches requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense. See *Galliher* v. *Caldwell*, 145 U. S. 368, 372; *Southern Pacific Co.* v. *Bogert*, 250 U. S. 483, 488–490; *Gardner* v. *Panama R. Co.*, 342 U. S. 29, 31.

The petitioner alleges lack of diligence in the Government's failure to proceed to revoke his certificate within a reasonable time after his arrest and trial under the 1925 indictment for conspiracy to violate the Prohibition laws, or at least within a reasonable time after his admissions before the federal grand jury in 1939. There is no necessity to determine the merits of this argument, for the record is clear that the petitioner was not prejudiced by the Government's delay in any way which satisfies this requisite of laches. In *Brown* v. *County of Buena Vista*, 95 U. S. 157, 161, this Court said: "The law of laches, like the principle of the limitation of actions, was dictated by experience, and is founded in a salutary policy. The lapse of time carries with the memory and life of wit-

nesses, the muniments of evidence, and other means of proof." Insofar as these factors inherent in the lapse of time were operative in the present case, they seem plainly to have worked to petitioner's benefit, not to his detriment. The evidence of the petitioner's real estate activity consisted almost exclusively of public records. There is no suggestion that these records are not all the evidence of real estate activity there is or that any had been destroyed or were unavailable. Nor do we perceive any prejudice to the petitioner in the fact that the Naturalization Examiners who processed his application, the witnesses who appeared for him, and the judge who admitted him to citizenship, are dead. The examiners and the judge obviously could supply no evidence bearing on his claim that real estate was his occupation. Their knowledge on that subject came from him. And it stretches credulity to suppose that he would have inquired of those officials whether "occupation" meant lawful occupation. Finally, the petitioner does not suggest how the witnesses who supported his petition could have aided him on any issue material in this proceeding. In addition, his bootlegging associate, Sausser, died in 1926, and would not have been available even had the Government brought a proceeding immediately after the criminal trial.

Indeed, any harm from the lapse of time was to the Government's case. Although that case was supported primarily by documentary proofs and the petitioner's admissions, the Government supplemented this evidence with the testimony of the petitioner's associates in the bootlegging enterprise, and of others who had knowledge of those events. The Government's proof was made more difficult when a number of the witnesses admitted that their memories of details had dimmed with the passage of the years.

We cannot say, moreover, that the delay denied the petitioner fundamental fairness. He suffered no prejudice

from any inability to prove his defenses. Rather, the harm he may suffer lies in the harsh consequences which may attend his loss of citizenship. He has been a resident of the United States for over 65 years, since the age of four. We may assume that he has built a life in reliance upon that citizenship. But Congress has not enacted a time bar applicable to proceedings to revoke citizenship procured by fraud. On this record, the petitioner never had a right to his citizenship. Depriving him of his fraudulently-acquired privilege, even after the lapse of many years, is not so unreasonable as to constitute a denial of due process. Cf. *Johannessen* v. *United States*, 225 U. S. 227, 242–243.

IV.

The petitioner moved for leave to amend his petition for a writ of certiorari to add a question whether the present proceeding was barred by the order of the District Court dismissing the earlier proceeding on remand, without specifying whether the dismissal was with or without prejudice. We deferred decision on the motion pending oral argument. The motion is granted and we proceed to determine the merits of the question.

It is the petitioner's contention that the order dismissing the earlier complaint must be construed to be with prejudice because it did not specify that it was without prejudice, and the ground of dismissal was not within one of the exceptions under Rule 41 (b) of the Federal Rules of Civil Procedure. That Rule provides:

> "For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal

> on the ground that upon the facts and the law the plaintiff has shown no right to relief. . . . Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits."

We hold that a dismissal for failure to file the affidavit of good cause is a dismissal "for lack of jurisdiction," within the meaning of the exception under Rule 41 (b). In arguing contra, the petitioner relies on cases which hold that a judgment of denaturalization resulting from a proceeding in which the affidavit of good cause was not filed is not open to collateral attack on that ground. *Title* v. *United States*, 263 F. 2d 28; *United States* v. *Failla*, 164 F. Supp. 307. We think that petitioner misconceives the scope of this exception from the dismissals under Rule 41 (b) which operate as adjudications on the merits unless the court specifies otherwise. It is too narrow a reading of the exception to relate the concept of jurisdiction embodied there to the fundamental jurisdictional defects which render a judgment void and subject to collateral attack, such as lack of jurisdiction over the person or subject matter. We regard the exception as encompassing those dismissals which are based on a plaintiff's failure to comply with a precondition requisite to the Court's going forward to determine the merits of his substantive claim. Failure to file the affidavit of good cause in a denaturalizatiton proceeding falls within this category. *United States* v. *Zucca*, *supra*; *United States* v. *Costello*, 356 U. S. 256.

At common law dismissal on a ground not going to the merits was not ordinarily a bar to a subsequent action on the same claim. In *Haldeman* v. *United States*, 91 U. S. 584, 585–586, which concerned a voluntary nonsuit, this Court said, "there must be at least one decision on a *right*

between the parties before there can be said to be a termination of the controversy, and before a judgment can avail as a bar to a subsequent suit. . . . There must have been a right adjudicated or released in the first suit to make it a bar, and this fact must appear affirmatively." A similar view applied to many dismissals on the motion of a defendant. In *Hughes* v. *United States*, 4 Wall. 232, 237, it was said: "In order that a judgment may constitute a bar to another suit, it must be rendered in a proceeding between the same parties or their privies, and the point of controversy must be the same in both cases, and must be determined on its merits. If the first suit was dismissed for defect of pleadings, or parties, or a misconception of the form of proceeding, or the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit." See also *House* v. *Mullen*, 22 Wall. 42, 46; *Swift* v. *McPherson*, 232 U. S. 51, 56; *St. Romes* v. *Levee Steam Cotton Press Co.*, 127 U. S. 614, 619; *Burgett* v. *United States*, 80 F. 2d 151; *Gardner* v. *United States*, 71 F. 2d 63.

We do not discern in Rule 41 (b) a purpose to change this common-law principle with respect to dismissals in which the merits could not be reached for failure of the plaintiff to satisfy a precondition. All of the dismissals enumerated in Rule 41 (b), which operate as adjudications on the merits—failure of the plaintiff to prosecute, or to comply with the Rules of Civil Procedure, or to comply with an order of the Court, or to present evidence showing a right to the relief on the facts and the law—primarily involve situations in which the defendant must incur the inconvenience of preparing to meet the merits because there is no initial bar to the Court's reaching them. It is therefore logical that a dismissal on one of these grounds should, unless the Court otherwise specifies, bar a subsequent action. In defining the situations where

dismissals "not provided for in this rule" also operate as adjudications on the merits, and are not to be deemed jurisdictional, it seems reasonable to confine them to those situations where the policy behind the enumerated grounds is equally applicable. Thus a *sua sponte* dismissal by the Court for failure of the plaintiff to comply with an order of the Court should be governed by the same policy. Although a *sua sponte* dismissal is not an enumerated ground, here too the defendant has been put to the trouble of preparing his defense because there was no initial bar to the Court's reaching the merits. See *United States* v. *Procter & Gamble Co.*, 356 U. S. 677, 680, and footnote 4; *American Nat. Bank & Trust Co.* v. *United States*, 142 F. 2d 571.[5]

In contrast, the failure of the Government to file the affidavit of good cause in a denaturalization proceeding does not present a situation calling for the application of the policy making dismissals operative as adjudications on the merits. The defendant is not put to the necessity of preparing a defense because the failure of the Government to file the affidavit with the complaint requires the

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[5] The inapplicability of the policy of the rule to other dismissals for failure to meet a precondition of adjudication has been recognized. The Advisory Committee on Amendments to the Federal Rules recommended in 1955 the addition of another specific exception, for dismissals for "lack of an indispensable party." Although the proposal was not adopted, one commentator has written:

"Undoubtedly a dismissal for lack of an indispensable party should be a dismissal without prejudice since the dismissal proceeds on the theory that his presence is required in order that the court may make an adjudication equitable to all persons involved. . . . The Committee's proposal would, however, take care of the situation where the court did not specifically provide that the dismissal was without prejudice; and thus expressly provide a result which the courts, of necessity, would have to reach even if the dismissal did not specify that it was without prejudice." 5 Moore, Federal Practice, 1959, Cum. Supp., p. 38.

dismissal of the proceeding. Nothing in the term "jurisdiction" requires giving it the limited meaning that the petitioner would ascribe to it. Among the terms of art in the law, "jurisdiction" can hardly be said to have a fixed content. It has been applied to characterize other prerequisites of adjudication which will not be re-examined in subsequent proceedings and must be brought into controversy in the original action if a defendant is to litigate them at all. See, *e. g.*, *Des Moines Navigation & R. Co.* v. *Iowa Homestead Co.*, 123 U. S. 552 (diversity of citizenship); *In re Sawyer*, 124 U. S. 200, 220–221 (jurisdictional amount). See generally *Noble* v. *Union River Logging R. Co.*, 147 U. S. 165, 173–174. Decisions in the lower courts applying the exception construe "jurisdiction" to encompass dismissals on grounds similar to that in the present case. See *Madden* v. *Perry*, 264 F. 2d 169; *Myers* v. *Westland Oil Co.*, 96 F. Supp. 667, reversed on other grounds, 181 F. 2d 371. We therefore hold that the Government was not barred from instituting the present proceeding.

Affirmed.

MR. JUSTICE HARLAN took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 59.—October Term, 1960.

Frank Costello, Petitioner, v. United States of America. | On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[February 20, 1961.]

Mr. Justice Douglas, with whom Mr. Justice Black concurs, dissenting.

I do not think "bootlegging" *per se* would have been a ground for denying naturalization to an alien in the 1920's. If it were, it would be an act of hypocrisy unparalleled in American life. For the "bootlegger" in those days came into being because of the demand of the great bulk of people in our communities—including lawyers, prosecutors, and judges—for his products. However that may be, the forms of naturalization in use at the time did not ask for disclosure of all business activities of an applicant nor of all sources of income. If that had been asked and if only one source of income were disclosed, then there would be a concealment relevant to our present problem—whether the nondisclosed income was from bootlegging, playing the races, bridge or poker games, or something else. The "occupation" of an applicant was the question in the form Costello filed.* The form of the petition for naturalization did not ask for more; and unless we can say that "real estate" was not his "occupation" then we cannot let this denaturalization order stand. The Koslo Realty Corporation actually existed and petitioner was its president. It actually engaged in real

*The printed form of the Petition for Naturalization in use at the time had in it as item "Second" a line headed "My occupation is." After these words petitioner entered the words "Real Estate."

estate transactions. The fact that this real estate business was secondary in petitioner's regime did not make it any the less his "occupation." Petitioner answered truthfully when he listed "real estate" as his "occupation." He did not answer truthfully if the answer is taken to embrace all his sources of income. But, as I said, the form did not require that complete disclosure; and I would not resolve any ambiguity in favor of the Government. We could not do so and be true to the strict standard exacted from the Government by *Schneiderman* v. *United States*, 320 U. S. 118, 122–123.